No. 98-208-CFX Title: Carole Kolstad, Petitioner
v.
American Dental Association

Docketed: July 31, 1998 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Jul 31 1998	Petition for writ of certiorari filed. (Response due September 29, 1998)
	Aug 19 1998	Order extending time to file response to petition until September 29, 1998.
	Sep 28 1998	Brief of respondent American Dental Association in opposition filed.
	Sep 29 1998	Brief amici curiae of Mexican American Legal Defense And Educational Fund, et al. filed. VIDED.
	Oct 6 1998	Reply brief of petitioner Carole Kolstad filed. VIDED.
	Oct 7 1998	DISTRIBUTED. October 30, 1998
	Nov 2 1998	Petition GRANTED. SET FOR ARGUMENT March 1, 1999. **********
	Dec 8 1998	Order extending time to file brief of petitioner on the merits until December 21, 1998.
	Dec 17 1998	Joint appendix filed.
	Dec 21 1998	Brief of petitioner Carole Kolstad filed.
	Dec 21 1998	Brief amici curiae of National Employment Lawyers Association, et al. filed.
	Dec 21 1998	Brief amici curiae of Lawyers' Committe for Civil Rights Under Law, et al. filed.
	Dec 21 1998	Brief amicus curiae of Association of Trial lawyers of America filed.
	Dec 21 1998	Brief amici curiae of United States and Equal Employment Opportunity Commission filed.
	Jan 12 1999	Record filed.
	Jan 14 1999	CIRCULATED.
	Jan 19 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 19 1999	Brief amicus curiae of Society for Human Resource Management filed.
	Jan 20 1999	Brief of respondent American Dental Association filed.
	Jan 20 1999	Brief amicus curiae of Washington Legal Foundation filed.
	Jan 20 1999	Brief amicus curiae of Equal Employment Advisory Council filed.
	Jan 20 1999	Brief amicus curiae of Chamber of Commerce of the United States filed.
	Jan 20 1999	Brief amicus curiae of National Retail Federation filed.
	Jan 25 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Jan 29 1999	Motion of Rutherford Institute for leave to file brief amicus curiae filed.
	Feb 10 1999	Motion of respondent to permit the Chamber of Commerce of the United States to participate in oral argument as

2pp

No. 98-208-CFX

Entry	Date	Proceedings and Orders
		amicus curiae and for divided argument filed.
	Feb 11 1999	Opposition thereto by petitioner
	Feb 16 1999	Reply brief of petitioner Carole Kolstad filed.
	Feb 22 1999	Motion of Rutherford Institute for leave to file brief amicus curiae GRANTED.
	Feb 22 1999	Motion of respondent to permit the Chamber of Commerce of the United States to participate in oral argument as amicus curiae and for DENIED.
	Mar 1 1999	ARGUED.

Supreme Court, U.S.
FILED
JUL 31 1998
OFFICE OF THE CLERK

No. 97-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act, as amended, for unlawful intentional discrimination?*

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* The parties to this action are set forth in the caption.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carole Kolstad respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered on May 8, 1998.

OPINIONS BELOW

The January 22, 1996 decision of the district court denying respondent's motion to set aside the jury verdict, which is reported at 912 F. Supp. 13 (D.D.C. 1996), is set out at pp. 69a-74a of the Appendix. The original panel decision in the court of appeals, which is reported at 108 F.3d 1431 (D.C. Cir. 1997), is set out at pp. 42a-68a of the Appendix. The orders of the court of appeals denying rehearing and granting rehearing en banc limited to the issue of punitive damages are set out at pp. 75a-77a of the Appendix. The en banc decision of the court of appeals,

which is reported at 139 F.3d 958 (D.C. Cir. 1998), is set out at pp. 1a-41a of the Appendix.

JURISDICTION

The en banc decision of the court of appeals was entered on May 8, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The pertinent portions of 42 U.S.C. § 1981a are set out at p. 78a-80a of the Appendix.

STATEMENT OF THE CASE

Petitioner commenced this action in 1994 in the United States District Court for the District of Columbia, alleging that she had been denied a promotion because of her sex in violation of Title VII of the 1964 Civil Rights Act. The complaint sought back pay, injunctive relief and punitive damages.

The case was tried to a jury, which found that petitioner had indeed been the victim of intentional discrimination on the basis of sex. The district court denied respondent's post-trial motion for judgment as a matter of law on the merits of petitioner's discrimination claim. (App. 69a-74a). The court of appeals panel which first heard this case unanimously upheld the jury's finding of intentional discrimination. (App. 46a-49a). The court of appeals declined to grant rehearing en banc with regard to the liability determination, and that aspect of the case is no longer at issue.[1]

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[1] The panel decision overturned the district court's decision denying injunctive relief and counsel fees, and remanded for further consideration of those issues.

The question which was addressed by the court of appeals en banc, and which is the subject of this petition, concerns petitioner's claim for punitive damages. Title VII was amended in 1991 to authorize awards of punitive damages; the provision regarding those awards is codified in 42 U.S.C. § 1981a. In support of her claim for punitive damages, petitioner offered at trial four types of evidence. First, petitioner demonstrated that the discrimination at issue was not the isolated spontaneous act of a lower level supervisor, but the result of a three month scheme involving respondent's national Executive Director and other high-level executives. As part of that scheme, respondent's officials (i) repeatedly met with the successful male candidate about the promotion, while refusing to meet with petitioner,[2] (ii) accorded only the male candidate a formal interview by respondent's Executive Director,[3] and (iii) made a last minute change in the job description of the position at issue so that it would conform to

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[2] "Before ADA posted the opening, [the male candidate] Spangler frequently met with the incumbent (Jack O'Donnell), ADA did not post the position promptly after O'Donnell decided to retire, and a secretary familiar with the process testified that she thought Spangler was being groomed for the job. Leonard Wheat, head of ADA's Washington office and the person most closely supervising the competing candidates, refused to meet with Kolstad to discuss O'Donnell's position, despite frequently meeting with Spangler." (App. 38a).

[3] "Although Executive Director Dr. William Allen formally appointed O'Donnell's successor, Allen—based in ADA's Chicago headquarters—relied heavily upon Wheat's recommendation of Spangler. Assigning all legislative work to Spangler, Wheat repeatedly refused Kolstad's requests to work on legislative matters, despite their relevance to the regulatory issues when covered and her experience in the field. Formally interviewing Spangler but not Kolstad, Allen failed to review Kolstad's numerous, detailed, positive performance evaluations." (App. 38a).

the male candidate's background.[4] Second, petitioner showed that the very discriminatory technique used against her had been the subject of an earlier class action lawsuit against respondent,[5] and that respondent had agreed in 1984 to a consent decree which forbad promotion by pre-selection;[6] the position at issue in this case was the second highest position in the ADA's Washington office and the first executive-level job to be filled there following the expiration of that decree. (App. 43a). Third, petitioner proved that the explanation which respondent offered at trial for selecting the male candidate was entirely different from the explanation which it

[4] "[A] few days before posting the job, [the ADA's Executive Director] edited the description to fit [the male's] qualifications. [The incumbent's] position description originally stated that its 'most important responsibility' was to '[m]aintain liaison with federal agencies, bureaus and Administration,' corresponding directly to Kolstad's work at ADA. Tailoring the job description to [the male's] specialty, [the selecting official] added...whole phrases from the position description questionnaire used to hire [the male]." (App. 38a-39a).

[5] In *Resnick v. American Dental Ass'n*, 90 F.R.D. 530, 536-41 (N.D. Ill. 1981), the district court in Chicago, where the ADA maintains its headquarters, certified a nationwide class of women in a suit brought against the ADA under Title VII and the Equal Pay Act. (App. 39a). In *Resnick*, Plaintiffs had alleged that the ADA had engaged in the systemic denial of promotions to women to high-level "supervisory and management positions" which "perpetuates and exacerbates...policies and practices of discrimination." 90 F.R.D. at 534 (internal quotation marks omitted).

[6] "Kolstad proffered a 1984 consent decree [in *Resnick*, which]...showed that ADA had specific knowledge of the impropriety of preselection as well as of the connection between preselection and employment discrimination..., [t]he decree stated that 'pre-selection of a favored candidate is contrary to ADA's firm policy of giving full and fair consideration to each application,... [v]iolations of [which]...will be cause for discipline.'" (App. 39a).

had given at the time of the selection,[7] and offered evidence that respondent had altered documents to justify its selection of the male candidate.[8] (App. 39a). Fourth, petitioner offered evidence that the director of respondent's Washington office, whose recommendation of the male candidate was accepted by the national headquarters, had repeatedly told sexually offensive jokes at staff meetings and had referred to several prominent professional women in gender-specific derogatory terms.[9] Despite this evidence, the district court refused to give the jury an instruction regarding punitive damages.[10] A divided panel of the court of appeals held that the district court had erred in dismissing petitioner's punitive damage claim; the panel majority and a dissenting judge

[7] "After telling [Kolstad] that she was passed over because she lacked experience with health care reform and was too valuable in her position, ADA abandoned that justification at trial, instead attacking Kolstad's general qualifications and writing ability." (App. 39a).

[8] "[T]he jury could have concluded that ADA attempted to cover up [the male's] preselection" by "edit[ing]" the position description, by "[t]ailoring" it to fit the male's "specialty" and that ADA had "altered documents to justify his promotion." (App. 38a-39a). Based on the trial record, the jury could have found that "Kolstad was the more qualified of the two candidates," that the less experienced "male candidate" "technically failed to meet the minimum posted requirements for the position." (App. 37a-38a).

[9] "Kolstad's supervisor whose advice [the selecting official] relied on in deciding to promote [the male employee] instead of Kolstad, told sexually offensive jokes at the office and referred to professional women as 'bitches' and 'battleaxes.'" (App. 40a).

[10] Plaintiff asked the district court to follow a then recent District of Columbia Circuit decision regarding punitive damages under 42 U.S.C. § 1981, which had held that evidence sufficient to support a finding of intentional discrimination would also support an award of punitive damages. *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995).

offered sharply differing views as to the legal standard for awarding punitive damages under section 1981a of Title VII. (App. 49a-53a, 57a-58a). The court of appeals granted rehearing en banc limited to this issue. (App. 75a-76a).

A narrowly divided en banc court adopted an extraordinarily stringent limitation on punitive damages awards under Title VII and sustained the rejection of petitioner's punitive damage claim. Five members of the en banc court joined in an opinion written by Judge Williams, who had dissented from the original panel decision. Five other members of the court joined in an opinion, written by the author of that panel decision, Judge Tatel, endorsing a substantially less restrictive standard. The eleventh member of the court of appeals, who cast the tie breaking vote, proclaimed "the matter is exceedingly close", and concurred in Judge Williams' opinion on the ground that "the language of § 1981a(b)(1) will bear the meaning the majority opinion ascribes to it." (App. 23a).

The majority opinion held that "punitive damages in a Title VII case may be imposed only on a showing of egregious conduct" (App. 2a), "truly outrageous acts of discrimination." (App. 21a n. 9). The majority dismissed intentional discrimination on the basis of sex, race or religion as a "garden variety" violation of the law insufficient by itself to warrant submission of petitioner's punitive damage claim to the jury. (App. 18a). Although section 1981a expressly authorizes punitive awards if the plaintiff proves that discrimination occurred as a result of "reckless indifference" on the part of an employer, the majority held that a plaintiff could not meet that standard by showing that the employer *intentionally* discriminated and *deliberately* violated Title VII.

The majority conceded that its standard appeared to be at odds with the actual language of section 1981a. "[S]ince

recklessness is typically subsumed within intent in the *mens rea* taxonomy, it might appear logical to read § 1981a(b)(1) as authorizing punitive damages whenever intent is shown." (App. 6a). Similarly, Judge Randolph acknowledged

> the common legal notion . . . that "[w]hen recklessness suffices to establish an element, such an element also is established if a person acts purposely or knowingly." If one fed this data into a parsing machine, it would answer— . . . whenever there is intentional discrimination there is at least reckless disregard.

(App. 23a). Judge Randolph, however, dismissed these textual arguments as "linguistic points." (*Id.*).

The majority acknowledged that its decision was contrary to the standard applied by the Second Circuit. (App. 20a). It recognized that Congress intended to base the Title VII punitive damage standard on the standard applicable to punitive damages claims under section 1981 (App. 10a), and emphasized that there was a "circuit split" regarding the section 1981 standard. (App. 8a-9a).

The five dissenters objected that the majority opinion was inconsistent with the language of the statute, which expressly authorizes punitive awards in cases of "reckless indifference." The rule adopted by the majority, they argued, "read the reckless indifference standard out of the statute." (App. 35a). The dissenters also objected to the "egregiousness" requirement on the ground that "section 1981a(b)(1) never mentions egregiousness." (App. 24a). The dissenting opinion agreed that its difference with the majority regarding the standard for punitive awards under Title VII derived from a division among the circuits regarding section 1981 punitive damage awards. (App. 32a-33a). The five dissenters also

argued that the standard adopted by the majority was inconsistent with this Court's decisions in *Smith v. Wade*, 461 U.S. 30 (1983), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). (App. 25a-29a).

REASONS FOR GRANTING THE WRIT

In 1991 Congress amended Title VII to authorize for the first time punitive damage awards for violations of that statute. Punitive damages are authorized if the respondent

> engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. §1981a(b)(1). Such awards are not permitted against government defendants or for practices that were unlawful solely because they had a disparate impact. 42 U.S.C. §§ 1981a(a)(1), 1981a(b)(1).

This case presents a multi-faceted conflict regarding when punitive damages can be awarded under Title VII against employers guilty of intentional discrimination. Since 1991, a wide variety of inconsistent rules have been adopted by the various circuits regarding such awards. As the court of appeals in the instant case frankly recognized, these differences regarding punitive damage awards under Title VII have their roots in a longstanding inter-circuit conflict regarding the standard for such awards under 42 U.S.C. § 1981. (App. 8a-9a). This Court granted certiorari in 1996 to resolve that underlying § 1981 issue, but that case was

dismissed as moot after a settlement was reached. *Merrill v. Barbour*, *cert. granted in part*, 116 S.Ct. 805,[11] *dismissed as moot*, 116 S.Ct. 1037 (1996). The confusion among the lower courts also stems from a disagreement among those courts about the meaning of several decisions of this Court, particularly *Smith v. Wade*, 461 U.S. 30 (1983).

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF SEVEN OTHER CIRCUITS

(a) The majority of the en banc court below adopted two core holdings. First, it concluded that the existence of intentional discrimination on the part of an employer could never by itself be sufficient to permit an award of punitive damages. (App. 5a). Second, the en banc majority held that the proper standard for determining the availability of punitive damages turns on the type of discriminatory practices in which an employer had engaged, and that such awards may be made only for discriminatory practices that are "egregious." "We . . . hold that punitive damages in a Title VII case may be imposed only on a showing of egregious conduct." (App. 2a). That standard cannot be met by "garden-variety" intentional discrimination (App. 18a); a plaintiff must prove the existence of "truly outrageous acts of discrimination." (App. 21a n. 9).[12] Judge Randolph, who cast the deciding

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[11] The Court granted certiorari limited to Question 2 of the petition, which was

> "Whether *Smith v. Wade*, 461 U.S. 30 (1983), permits an award of punitive damages in every case under 42 U.S.C. § 1981 in which there is a finding of intentional discrimination."

Petition for Writ of Certiorari, *Merrill v. Barbour*, No. 95-27, p. i.

[12] *See* App. at 20a("The evidence in this case does not show the kind of egregious discriminatory conduct necessary for the imposition of punitive damages.")

vote, insisted that punitive damages could be permitted in "only the worst cases." (App. 23a).

The courts of appeals for the First, Second, Eighth and Tenth circuits have expressly considered and rejected the very doctrine embraced by the District of Columbia Circuit. The court below candidly recognized that its decision conflicts with the Second Circuit opinion in *Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997). (App. 20a). In *Luciano*, the defendant advanced, and the court of appeals rejected, the rule adopted by the court in this case.

> The Company argues that Section 1981 of the Civil Rights Act of 1991 was intended to limit the availability of punitive damages to cases of "extraordinarily egregious" conduct. . . . We find nothing in the language of the statute to support the Company's argument that there must . . . be a finding that the defendants' conduct was "extraordinarily egregious." . . . [The defendant] contends that remarks of Senator Dole and Representative Hyde . . . support its interpretation that the punitive damages provision requires a showing of "extraordinarily egregious" conduct. The short answer to this is that the plain language of the statute . . . is inconsistent with these statements.

110 F.3d at 219-220. The court below relied on the identical remarks of Senator Dole that were rejected by the Second Circuit in *Luciano*. (App. 10a).

In *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997), the Eighth Circuit endorsed both *Luciano* and the original panel decision in this very case.

> We do not agree that the 1991 Civil Rights Act, 42 U.S.C. § 1981a(b)(1), limits the availability of punitive damages to "exceptional circumstances of unusual bad motive that transcends ordinary intentional misconduct." The Second Circuit rejected a similar argument in *Luciano . . . accord Kolstad v. American Dental Ass'n*, 108 F.3d at 1437-39.

123 F.3d at 1065-66. The Tenth Circuit rejected any egregiousness requirement in *Adakai v. Front Row Seat, Inc.*, 125 F.3d 861, —, 1997 WL 603458 at *2 (10th Cir., Oct. 1, 1997)("The defendant's acts need not have been 'extraordinarily egregious' to support a finding of punitive damages."). The First Circuit has twice held that under all federal civil rights statutes authorizing punitive damages proof of intentional discrimination is sufficient per se to warrant such an award. *Criado v. IBM Corp.*, 1998 WL 282836 (1st Cir., June 5, 1998),[13] *petition for rehearing pending*;[14] *Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir. 1998).[15]

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[13] "This circuit has held that under federal law the evidence of intent that is necessary to support a punitive damages award 'is the same [evidence of] "intent" that is required for a finding of discrimination in the first place.' *Dichner v. Liberty Travel* . . . ." 1998 WL 282836 at *8.

[14] The defendant in *Criado* has sought rehearing on the ground that the decision in that case is in conflict with the en banc decision in the instant case. Petition for Rehearing, *Criado v. IBM Corp.*, No. 97-1342 (1st Cir.), pp. 7-8.

[15] "Under a federal antidiscrimination statute that provides for punitive damages (like the ADA), a jury may be allowed to assess such damages 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.' *Smith v. Wade*, 461 U.S. 30, 56 . . . . A jury need not find some special sort of malign purpose in order to exact punitive damages in a disparate treatment case because the 'intent' that is necessary to undergird an award of punitive damages in such a case is the same 'intent' that is required for a finding of discrimination in the first place." 141 F.3d at 33-34.

Under the standard applied by the First, Second, Eighth and Tenth Circuits, it would have been error to refuse to charge the jury in this case on punitive damages.[16]

Outside the District of Columbia Circuit, the prevailing rule is that the availability of punitive damages turns, not on the particular type of discriminatory practices in which an employer may have engaged, but on the discriminator's mental state. In the First Circuit, punitive damages may be awarded if there was "consciousness of wrongdoing" on the part of the employer. *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 509 (1st Cir. 1996). The Ninth Circuit authorizes such awards on a showing that "the defendant 'almost certainly knew that what he was doing was wrongful and subject to punishment.'" *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998). The Eighth Circuit holds that the "reckless indifference" required by the

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[16] As the en banc majority noted, the law in the Seventh Circuit varies from panel to panel. (App. 20a n.8). In *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d 576, 581 (7th Cir. 1996), that circuit held

> [E]vidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the [factfinder] to award punitive damages, provided the [court or jury], in its discretionary moral judgment, finds that the conduct merits a punitive award. No additional evidence [of reckless indifference] is needed.

This is the standard adopted in *Luciano* and rejected by the en banc court in this case. *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995), upheld an award of punitive damages based on a single case of discriminatory termination plus "a smidgen" of sexual harassment. *Jonasson v. Lutheran Child and Family Services*, 115 F.3d 436, 438 (7th Cir. 1997), approved such punitive awards for "intentional disregard for the statutory rights of . . . female employees". On the other hand, *Lindale v. Tokheim Corp.*, 1998 WL 272763 *6 (7th Cir. May 29, 1998), requires proof of some sort of "circumstances of aggravation", such as "a pattern of flouting of the law."

statute can be demonstrated by proof that the defendant "knew what constituted unlawful employment practices", *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1066 (8th Cir. 1997), or by proof, in a harassment case, that the harassers acted "knowing that [their language] would offend a reasonable person in [the plaintiff's] position." *Delph v. Dr.Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 358 (8th Cir. 1997). The conscious wrongdoing rule applied in the First, Eighth and Ninth Circuits is similar to the standard proposed by the five dissenting judges in the court below. (App. 25a-26a. 29a-30a).

Three circuits apply a rule that punitive damages may be awarded if the proven intentional discrimination was perpetrated by an individual who was part of "management" or "higher management". *Lindale v. Tokheim Corp.*, 1998 WL 222763 *6 (7th Cir. May 29, 1998)("involvement of higher management" among the aggravating circumstances warranting punitive damages); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575 (8th Cir. 1997)("The requisite level of recklessness . . . can be inferred from management's participation in the discriminatory conduct"); *Adakai v. Front Row Seat, Inc.*, 1997 WL 603458 *2 (10th Cir. Oct. 1, 1997)("The requisite level of recklessness or outrageousness [required to support punitive damages] can be inferred from management's participation in the discriminatory conduct.")(Insertion in original)(*citing Kim v. Nash Finch Co.*). Had the instant case arisen in the Seventh, Eighth or Tenth Circuits, punitive damages would have been entirely permissible in this case, since, as the undisturbed panel decision noted (App. 47a-48a), and the en banc dissenters emphasized (App. 38a-39a), the proven discrimination occurred at the hands of respondent's national Executive Director.

A number of circuits also hold that punitive awards are proper if an employer perpetrated the discrimination through a deliberate scheme, engaged in duplicitous behavior, or lied about its actions or motives. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1066-67 (8th Cir. 1997)(relying on fact that perpetrator both lied and doctored victim's personnel file); *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d 576, 582 (7th Cir. 1996)(punitive award justified where employer "attempted[ed] to deceive the court, by presenting false reasons for its decision to discharge"); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997) (relying on discriminator's actions "in falsifying documents to establish a paper trail"). As the dissenting opinion below properly emphasized (App. 37a-40a), the facts of this case easily satisfy these requirements.[17] On the other hand, the Sixth Circuit holds that duplicity is not a legally sufficient basis for punitive damages, *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996), and the majority below necessarily rejected the standards accepted in the Fifth, Seventh and Eighth Circuits.

The court below, although acknowledging the existence of a conflict regarding the standard under Title VII for punitive damages, sought to minimize its difference with the other circuits by proposing to define the issue simply as whether section 1981a requires proof of *anything* more than intentional discrimination. As to that issue, of course, there is a clear inter-circuit conflict. Moreover, as the dissent below suggested, even the circuits which require more than proof of intentional discrimination require far less than does

[17] E.g. App. 38a-39a (jury "could have concluded" based on evidence before it that respondent had "altered documents" and had "attempted to cover up" the pre-selection of the male candidate.)

the District of Columbia Circuit, and virtually all other circuits adhere to a legal standard that would readily be satisfied by the circumstances of this case.

(b) The en banc majority expressly refused to apply to a Title VII discrimination claim the standard which is applied in that circuit to a section 1981 discrimination claim. In the District of Columbia Circuit, the punitive damages standard in section 1981 cases is avowedly different from and far less restrictive than that circuit's standard for Title VII cases. In a section 1981 case "evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award punitive damages, provided the jury, in its 'discretionary moral judgment'. . . . finds that the conduct merits a punitive award. . . . No additional evidence is required." *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995). This is precisely the standard which the court below rejected for Title VII claims. Thus, the availability of punitive damages in a race discrimination case in that circuit depends on whether the plaintiff has sued under section 1981 or under Title VII, and sex discrimination victims now have less effective remedies than do race discrimination victims, precisely the anomalies that Congress sought to correct when it amended Title VII in 1991.

This approach has been generally rejected by the other courts of appeals. Most adhere to the view expounded by the Fifth Circuit that Congress intended that a single standard be applied to all such punitive damage claims, regardless of whether they arose under Title VII or section 1981 and regardless of whether the discrimination at issue was on the basis of race, national origin, gender or religion.

> Congress's [sic] primary concern with enacting punitive damages under § 1981a(b)(1) was to unify the law under Title VII. . . . In furtherance of this

> unification effort, Congress permitted the imposition of punitive damages under Title VII in the same general circumstances as punitive damage awards imposed by courts under § 1981 . . . . Accordingly, we shall consider the propriety of punitive damage awards under §§ 1981 and 1981a under the same criteria.

Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 941-42 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997). The Eighth and Ninth Circuits have expressed a similar view. *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1066 (8th Cir. 1997)(punitive damages available under section 1981a "to the same extent and under the same standards that are available to plaintiffs under 42 U.S.C. § 1981"); *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1301-04 (9th Cir. 1998). Decisions in the First,[18] Second,[19] and Fourth[20] Circuits repeatedly apply section 1981 caselaw in determining the availability of punitive damages under Title VII. Only in the

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[18] *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996)(*citing Rowlett v. Anheuser-Busch, Inc.*,832 F. 2d 194 (1st Cir. 1987). The First Circuit has twice cited *Rowlett* for a more general rule that in *all* federal civil rights cases proof of intentional discrimination is sufficient to warrant an award of punitive damages. *Criado v. IBM Corp.*, 1998 WL 282836 *8 (1st Cir. June 5, 1998)("*Rowlett* held that a finding of intentional discrimination is sufficient to warrant punishment for a defendant"); *Dichner v. Liberty Travel*, 141 F.3d 24, 34 (1st Cir. 1998) (quoting *Rowlett* for the rule that in an intent case "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable.").

[19] *Luciano v. Olsten Corp*, 110 F.3d 210, 220 (2d Cir. 1997)(*citing Rowlett*).

[20] *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 983 (4th Cir. 1997)(*citing Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104 (6th Cir. 1987)).

District of Columbia Circuit is the availability of punitive damages avowedly more restricted in Title VII cases than in suits brought under section 1981.

(c) These conflicting Title VII standards have arisen in large measure because there are differing standards among the circuits regarding when awards of punitive damages are permissible under section 1981 itself. The majority below frankly acknowledged that widespread conflict.

> [T]he circuits are *deeply divided* as to the proper standard for punitive liability under § 1981. . . . Four courts of appeals have held that egregious misconduct beyond mere intent to discriminate is required for punitive damages under § 1981 . . . . Three other circuits have held that a finding of intentional discrimination, without more, is enough to put the question of punitive damages before the jury in the usual sec. 1981 case . . . . [T]he House Report reflects this circuit split.

(App. 8a-9a) (Emphasis added). The dissenters agreed that "our sister circuits have split over the meaning of *Smith [v. Wade]*," (App. 33a), noting the existence of

> two irreconcilable section 1981 cases—*Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir. 1987), limiting punitive damages to "egregious" cases, and *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205-06 (1st Cir. 1987), holding that plaintiffs need prove nothing beyond intentional discrimination for juries to consider punitive damages. The Court's egregiousness standard comports with *Beauford*. My interpretation of section 1981a comports with *Rowlett*.

(App. 32a).

The leading section 1981 case disapproved by the en banc court below, despite having been cited in the House Report on the 1991 Civil Rights Act, is *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987)[21]. The First Circuit opinion in that case was joined by then Judge Breyer. *Rowlett* held that the phrase "reckless indifference," words later incorporated verbatim in the 1991 Act, mean that

> punitive damages are within the jury's discretion in cases requiring proof of intentional wrongdoing . . . . In such cases, the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable. That does not mean that punitive damages are appropriate in each case of an intentional wrong, but rather that in each case the trier of fact has the discretion to determine whether punitive damages are necessary.

832 F.2d at 205. The en banc court below expressly refused to apply this standard. (App. 9a-10a). Conversely, *Rowlett* expressly rejected the requirement, adopted below, that a victim of intentional discrimination must also adduce proof of "aggravating circumstances." 832 F.2d at 205-06.

The First Circuit reiterated this view in *Hernandez-Tirado v. Artau*, 874 F.2d 866, 868 (1st Cir. 1989), on which the dissenters below expressly relied. (App. 30a). That decision, written by then Judge Breyer, reasserted that "reckless indifference" under section 1983 could ordinarily be demonstrated by evidence of an intentionally discriminatory act. 874 F.2d at 868. *Hernandez-Tirado* explained, as did the dissenters below (App. 29a-30a), that that standard would not mean that punitive damages could be awarded in *all* cases

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[21] "*Rowlett* . . . supports Kolstad's position, while . . . *Beauford* . . . supports ADA's position." (App. 9a).

of intentional discrimination, because there could be situations in which it was not clear whether the intentional action was unlawful; in such instances the defendant's action would not involve reckless indifference. 874 F.2d at 869-71. The en banc court below, however, vehemently rejected that approach. (App. 18a).[22]

Two years ago, this Court granted certiorari to resolve the circuit conflict involving the underlying § 1981 issue, but that case was dismissed as moot after a settlement was reached. *Merrill v. Barbour*, *cert. granted in part*, 116 S.Ct. 805, *dismissed as moot*, 116 S.Ct. 1037 (1996).

II. THE DECISION BELOW IS IN CONFLICT WITH THREE DECISIONS OF THIS COURT

The five dissenting judges below properly concluded that the majority opinion is inconsistent with this Court's opinions in *Smith v. Wade*, 461 U.S. 30 (1983), *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). (App. 24a-28a). The circuit courts which have rejected the "egregiousness" requirement adopted by the court below have repeatedly concluded that

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[22] *Compare* App. 16a (rejecting as a meaningless distinction a rule under which "[i]f the scope or nature of a given right is sufficiently obscure, a defendant might *intentionally* discriminate but be merely *negligent* as to the existence of the right")(emphasis added) *with* 874 F.2d at 870 ("Although [the defendant's] dismissal of Hernandez was an '*intentional*' tort, the dismissal was *negligent* in respect to the existence of a federally protected right.")(Emphasis added).

this Court's decision in *Smith v. Wade* precludes adoption of any such standard.[23] The Ninth Circuit recently observed that since the decision in *Smith v. Wade* "many other decisions [in the circuit courts have] departed from *Wade's* approach." *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1302 (9th Cir. 1998).

The court below recognized that the actual language of section 1981a was expressly taken from *Smith v. Wade*, and the legislative history makes clear Congress' intent to adopt the standard in *Smith*. (App. 10a). The majority below, however, "construe[d] *Smith* as establishing a threshold requirement of egregiousness for the imposition of punitive damages in § 1983 cases—a requirement which Congress transferred largely intact to § 1981a(b)(1)." (App. 12a). On this interpretation of *Smith* neither an intent to discriminate on the basis of race or sex, nor an intent to violate the Constitution, would be sufficient under *Smith* to warrant the imposition of punitive damages.

This surprising conclusion assuredly stands *Smith v. Wade* on its head. The issue in *Smith v. Wade* was whether punitive damages in section 1983 cases should be *limited* to instances of intentional wrongdoing, or should be extended as well to cases of reckless indifference. The majority opinion,[24]

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[23] *Criado v. IBM Corp.*, 1998 WL 282836 at *8 (*citing Smith v. Wade*); *Dichner v. Liberty Travel*, 141 F.3d at 33 (*citing Smith v. Wade*); *Luciano v. Olsten Corp.*, 110 F.3d at 220 (*citing Smith v. Wade*); *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F.3d at 582 (*citing Smith v. Wade*); *Kim v. Nash Finch Co.*, 123 F.3d at 1066 (*citing Smith v. Wade*).

[24] 461 U.S. at 47 (punitive damages awardable for "evil motive" as well as reckless indifference), 54 (punitive damages appropriate for "*all* intentional or reckless invasions of the rights of others")(emphasis in original).

the dissenting opinion of then Justice Rehnquist,[25] and the dissenting opinion of Justice O'Connor,[26] all agreed that such intentional wrongdoing would warrant an award of punitive damages. The actual holding of the Court's decision was as follows:

> We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

461 U.S. at 56. Nothing in this formulation contains any reference to egregiousness; intentional discrimination on the basis of race or sex would assuredly constitute just such an "evil motive or intent," except in those circumstances in which the legality of the action might fairly have been in dispute. The First Circuit correctly rejected the D.C. Circuit's interpretation of *Smith v. Wade*.

> The Court [in *Smith*] made no mention of any requirement that, in addition to charging the jury about the level of intent necessary to support punitive damages, a trial court also explain to the jury that the misconduct be "extraordinary" or

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[25] 461 U.S. at 56 ("some degree of bad faith or improper motive"), 57 ("Wrongful intent", "evil intent"), 60 ("some sort of wrongful motive . . . or intentional doing of an act known to be unlawful"), 64 ("evil motive"), 72 ("evil motive"), 73 (an "intentional wrong"), 74 ("guilty intention", "wrongful intention"), 75 ("evil motive"), 78 ("some showing of wrongful intent"), 79 ("evil motive"), 84 ("evil motive", "wrongful intent"), 87 ("wrongful intent").

[26] 461 U.S. at 94 (punitive damages appropriate for "intentional . . . violations of constitutional rights").

> "outrageous." We will not construe this silence as a mere inadvertent lapse.

Rowlett v. Anheuser-Busch, Inc., 832 F.2d at 206.

The decision below conflicts as well with this Court's decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993). Both of these decisions construe the provision of the ADEA authorizing awards of liquidated damages for "willful" violations of the ADEA, and hold that a violation of the law is willful if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 469 U.S. 126. The "reckless disregard" standard in *Thurston* and *Hazen Paper* is indistinguishable from the "reckless indifference" standard in Title VII. *Thurston* holds that this standard is met by proof that the employer "wholly disregard[ed] the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law." *Id.*. That standard is assuredly satisfied by a finding of intentional discrimination on the basis of sex absent a claim—not advanced in this case—that the defendant had some reason to believe that the proven discrimination was lawful.

Only five years ago, this Court in *Hazen Paper* emphatically rejected an argument indistinguishable from that adopted by the District of Columbia Circuit in this case. The Court noted that the lower courts had frequently disregarded the holding of *Thurston* in cases of intentional age discrimination against individual employees. Writing for a unanimous Court, Justice O'Connor observed that "[t]he chief concern of these Circuits," like the majority below, "has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows

or recklessly disregards the illegality of its conduct." 507 U.S. at 615-16. The holdings of the circuit court opinions disapproved by this Court were virtually indistinguishable from the en banc opinion in this case.

> At least one Circuit refuses to impose liquidated damages in such a case unless the employer's conduct was "outrageous". See, *e.g. Lockhard v. Westinghouse Credit Corp.*, 879 F.2d 43, 57-58 (CA3 1989). Another requires that the underlying evidence of liability be direct rather than circumstantial. See, *e.g.*, *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (CA8 1989).[27]

507 U.S. at 615. This Court rejected these proposed limitations.

> We . . . reaffirm that the *Thurston* definition of "willful"—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute—applies to all disparate treatment cases under the ADEA. Once a "willful" violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation . . . .

507 U.S. at 617. Intentional, knowingly illegal discrimination that is "reckless disregard" under the ADEA must assuredly be "reckless indifference" under Title VII.

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[27] A similar argument was made by the majority below. (App. 21a n.9).

III. THIS CASE PRESENTS ISSUES OF SUBSTANTIAL IMPORTANCE

The number of cases affected by the question presented in this case is demonstrably substantial. According to the Administrative Office of the U.S. Courts, more than 24,000 employment discrimination cases are filed annually in federal court.[28] The EEOC receives more than 55,000 Title VII charges each year.[29] Although exact statistics are not available concerning the number of cases and charges alleging intentional discrimination under Title VII that are filed annually, they undeniably involve several thousand cases in the district courts and tens of thousands of Title VII charges.

The impact of the question presented in this case is clearly much greater than the analogous question under section 1981, which this Court granted certiorari to resolve two years ago in *Merrill v. Barbour*, *cert. granted in part*, 116 S.Ct. 805 (1996). As a practical matter, a decision by this Court regarding the standard for punitive damage awards under Title VII will inform, if not control, the standard for such awards under section 1981 and under other federal civil rights statutes where the controversy regarding that standard today divides the lower courts.[30]

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[28] Administrative Office of the United States Courts, *Table C-2A; U.S. District Courts Civil Cases Commenced, By Nature of Suit During 12 Month Periods Ended Mar. 31, 1994 through 1998*, Employment Civil Rights Cases for 12 Months Ended March 31, 1998: 24,111 cases.

[29] EEOC, *Title VII of the Civil Rights Act of 1964 Charges: FY 1991-FY 1997*, FY 1996: 55,388 charges; FY 1997: 58,615 charges (compiled 4/17/98).

[30] *E.g. Dichner v. Liberty Travel*, 141 F.3d 24 (1st Cir. 1998) (Americans with Disabilities Act); *United States v. Balistrieri*, 981 F.2d 916 (7th Cir. 1992) (Fair Housing Act).

The majority below dismissed the intentional discrimination forbidden by Title VII as no more than a "garden variety" violation of federal law. (App. 18a). This attitude is entirely inconsistent with the profound importance which Congress has attached to federal anti-discrimination measures, which this Court has recognized to be "of the highest priority." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

Congress does not take a benign view of intentional discrimination in the workplace. Indeed, Congress expanded Title VII's remedies for victims of intentional discrimination to include punitive damages precisely because it found that backpay and equitable relief had proven inadequate "to deter unlawful harassment and intentional discrimination in the workplace." 42 U.S.C. § 1981a Note. The notion that some forms of intentional unlawful discrimination are more acceptable than others likewise offends Congress' recognition in the Glass Ceiling Act (enacted the same day as section 1981a) that "despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management" because "artificial barriers exist to advancement...." 42 U.S.C. § 2000e Note, section 202(a)(1)-(2). Pre-selection of a favored candidate constitutes an insurmountable barrier to advancement by women and minorities to positions in management, as the ADA itself once recognized.

The problem of discrimination has led the nation to adopt four constitutional amendments, fight a Civil War, and fashion a sea change in the relationship of the states to the national government. The District of Columbia Circuit's dismissive attitude towards the evil of intentional discrimination undermines all enforcement of civil rights laws in that circuit. The proper understanding of the gravity of

intentional discrimination was correctly articulated in the First Circuit decision spurned by the majority below.

> In a case involving intentional race discrimination the explanation of the twin purposes of punishment and deterrence is sufficient to guide the jury. After all, can it really be disputed that intentionally discriminating against a black man on the basis of his skin color is worthy of some outrage?

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 at 206.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 22, 1997 Decided May 8, 1998

No. 96-7030

CAROLE KOLSTAD,
APPELLANT/CROSS-APPELLEE

v.

AMERICAN DENTAL ASSOCIATION,
APPELLEE/CROSS-APPELLANT

Consolidated with
No. 96-7047

Appeals from the United States District Court
for the District of Columbia
(No. 94cv01578)

Bruce S. Harrison and *Elizabeth Torphy-Donzella* argued the cause and filed the briefs for appellee/cross-appellant.

Joseph A. Yablonski argued the cause and filed the brief for appellant/cross-appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

J. Ray Terry, Jr., Deputy General Counsel, and *Robert J. Gregory*, Attorney, were on the brief for amicus curiae Equal Employment Opportunity Commission.

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* TATEL, with whom *Chief Judge* EDWARDS, and *Circuit Judges* WALD, ROGERS and GARLAND join.

WILLIAMS, *Circuit Judge*: Carole Kolstad sued her employer, the American Dental Association ("ADA"), under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* At the close of evidence, the district court refused to instruct the jury on punitive damages. The jury awarded Kolstad back pay, and the district court denied ADA's motion for judgment as a matter of law on the issue of liability. A panel of this court reversed the district court's dismissal of Kolstad's punitive damages claim and remanded for a trial on punitive damages. *Kolstad v. American Dental Ass'n*, 108 F.3d 1431, 1437–39 (D.C. Cir. 1997). We granted *en banc* review on the question whether the standard of evidence for punitive damages under Title VII is, in all but a narrow range of cases, no higher than the standard for liability. We reject that view and hold that punitive damages in a Title VII case may be imposed only on a showing of egregious conduct. We further hold that no evidence of such behavior was shown at trial in this case, and thus affirm the district court on the issue of punitive damages.

* * *

ADA is a Chicago-based professional organization with an office in Washington. Jack O'Donnell worked in the Washington office, where he held the double-barreled title of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. The first role involved developing and advocating ADA's stance on federal legislation and regulations; the second entailed coordinating regular meetings of the Council on Governmental Affairs, a policy-making body composed of ADA members.

In September 1992 O'Donnell announced he would retire at year's end. Upon learning of O'Donnell's impending departure, Kolstad (then serving as ADA's Director of Federal Agency Relations) and Tom Spangler (then ADA's Legislative Counsel) each expressed interest in the vacancy. Since 1988, when Kolstad became responsible for federal regulatory matters at ADA, Leonard Wheat (the head of the Washington office) had repeatedly rated her performance as "distinguished." Before coming to ADA, Kolstad had spent six years in the General Counsel's office of the Department of Defense, where she drafted proposed legislation, prepared testimony for congressional hearings, and represented the Department's interests on Capitol Hill. Spangler began working at ADA in 1991. He dealt mainly with legislative matters, and had also received "distinguished" performance evaluations from Wheat. Before joining ADA, Spangler spent five years as a lobbyist for the National Treasury Employees Union. Both Kolstad and Spangler are lawyers. Each had worked directly with O'Donnell, Spangler principally supporting his lobbying efforts and Kolstad assisting his management of the Council.

Wheat asked Dr. William Allen, ADA's Executive Director in Chicago, to appoint O'Donnell's successor. After consulting with Wheat, Allen revised the "Position Description Questionnaire" for O'Donnell's job, incorporating verbatim elements of the Position Description Questionnaire that had been used to hire Spangler in 1991. (There is no evidence that the job has not in fact included those elements.) In October 1992 Wheat approved a performance evaluation of Spangler in which Spangler stated that one of his objectives for 1993 was to "provide management and administrative support ... for the Council on Government Affairs," work that O'Donnell was then performing.

Spangler formally applied for the vacancy once it was posted in November 1992. Kolstad also applied, after com-

plaining in a letter to Allen that Wheat had refused for several weeks to meet with her to discuss her interest in the position. Wheat interviewed both applicants and recommended Spangler for the job. In December 1992 Allen telephoned Kolstad to tell her that he had given the promotion to Spangler, explaining that she lacked experience with health care reform and was too valuable to ADA in her current position to take on O'Donnell's job.

Kolstad's claims of discrimination rest largely on the idea that ADA had in effect picked Spangler in advance of the formal selection process; seeing the formal process as largely facade, she contends that its artificial quality evidences intent to engage in sex discrimination. She also gave testimony, hotly contested, that Wheat told sexually offensive jokes at staff meetings and sometimes used derogatory terms to refer to prominent professional women.

After exhausting her administrative remedies before the Equal Employment Opportunity Commission, Kolstad filed suit, charging ADA with unlawful employment discrimination and seeking equitable relief, 42 U.S.C. § 2000e–5(g)(1), and damages, 42 U.S.C. § 1981a. At the close of the trial evidence, the district judge declined to give the jury the issue of punitive damages. The jury found that ADA had unlawfully discriminated against Kolstad on the basis of sex and awarded her $52,718 in back pay. The district court denied ADA's motion for judgment as a matter of law on liability. The court also held that Kolstad was not entitled to attorneys' fees or the equitable remedy of instatement. *Kolstad v. American Dental Ass'n*, 912 F. Supp. 13 (D.D.C. 1996).

A panel of this court affirmed the denial of ADA's motion for judgment as a matter of law, but reversed and remanded for trial on punitive damages and for reconsideration of Kolstad's claims for instatement and attorneys' fees. *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997). We granted rehearing *en banc* on the question whether the issue of punitive damages was properly withheld from the jury in this case. We conclude that it was, and affirm the district court.

* * *

Until 1991 successful plaintiffs in Title VII cases could only get "equitable" relief. See *Landgraf v. USI Film Products*, 511 U.S. 244, 252–53 (1994). In the Civil Rights Act of 1991, Congress authorized a broader range of monetary remedies for Title VII plaintiffs. The Act provides that a plaintiff who proves "intentional discrimination" in violation of Title VII may recover compensatory and punitive damages in addition to the equitable relief available under prior law. 42 U.S.C. § 1981a(a). A separate provision—the one at issue in this proceeding—limits the recovery of punitive damages to cases in which "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The sum of compensatory and punitive damages is capped at a total ranging from $50,000 and $300,000 depending on the employer's size. 42 U.S.C. § 1981a(b)(3).

We think that by enacting a separate provision setting out a special standard for the imposition of punitive damages, Congress showed that it did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII. The structure of the statute—one standard for basic liability, another for the exceptional remedy of punitive liability—strongly suggests that, before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination. To be sure, Congress's choice of language ("malice or ... reckless indifference to ... federally protected rights") hardly pinpoints what the content of that "something more" ought to be. Still less, however, does that language support either the rule proposed by Kolstad—that punitive damages should be available in every case strong enough to get to the jury on simple compensation—or even the marginally less permissive rule urged by the dissent.

We begin by rejecting Kolstad's broad assertion that a finding of intentional discrimination is enough to put the question of punitive damages before the jury in every Title

VII case.[1] Such an approach would conflict with the remedial structure of the statute, with legislative history indicating that Congress meant to reserve punitive damages for particularly egregious violations of Title VII, and with the Supreme Court's pronouncements on the purposes and availability of punitive damages. Kolstad's position does draw some superficial plausibility from the language of the statute: since recklessness is typically subsumed within intent in the *mens rea* taxonomy, it might appear logical to read § 1981a(b)(1) as authorizing punitive damages whenever intent is shown—in other words, whenever compensatory damages are available. It is a stretch, however, to conclude that, in expressing the standard for punitive damages in § 1981a(b)(1), Congress used terms whose meaning is clear or well settled. We said recently that mental-state standards like "recklessness" and "reckless disregard" are among the most malleable and ambiguous in the law. See *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668–69 (D.C. Cir. 1996); see also *United States v. Krizek*, 111 F.3d 934, 941 (D.C. Cir. 1997). "Malice," too, is susceptible of a range of meanings. See *Smith v. Wade*, 461 U.S. 30, 41 n.8 (1983); *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). As we have said, the structure of the statute strongly points to a two-tiered scheme of liability; we decline to read the pliable and imprecise language of § 1981a(b)(1) to flatten that scheme.

The legislative history of the Civil Rights Act of 1991 supports the conclusion we reach today. The House Report stated:

> Plaintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, *and must meet an even higher standard* (establishing that the employer acted with malice or reckless or callous indifference to their rights) *to recover punitive damages.*

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. at 72 ("House Report") (emphasis added).[2] Other statements from both sides of the legislative aisle indicate that Congress intended to establish an egregiousness requirement for punitive damages as a matter of law. See, e.g., 137 Cong. Rec. S 15473 (Oct. 30, 1991) (Interp. Memo of Sen. Dole et al.) (punitive damages to be available only in "extraordinarily egregious cases"); 137 Cong. Rec. S 15479 (Oct. 30, 1991) (statement of Sen. Bumpers) ("[Y]ou have to allege and prove intentional, malicious, willful discrimination in order to receive [punitive] damages under this bill, and certainly that is as it should be. It is a heavy burden for plaintiffs.").

Of course, legislative history is not legislative text, and House Reports are not, as the dissent implies, authoritative sources for determining what Congress "intended" or "expected" or "wanted." Dissent at 8 (citing House Report at 69–70). Yet it bears mentioning that even among all the conflicting and "frankly partisan" congressional statements concerning the Civil Rights Act of 1991, see *Landgraf*, 511 U.S. at 262 & n.15, we find nothing to support the proposition that Congress intended to make punitive damages available on the same legal basis as compensatory damages in the typical run of Title VII cases.

To be sure, the House Report does say that § 1981a(b)(1) "sets the same standard courts have applied under [42 U.S.C.] section 1981," a Reconstruction-era civil rights statute prohibiting racial discrimination in the making and enforce-

[1] Neither compensatory nor punitive damages are available in so-called "disparate impact" cases, § 1981a(a)(1), or in "mixed motive" cases in which the defendant demonstrates that it would have taken the same action in the absence of the impermissible motivating factor, 42 U.S.C. § 2000e-5(g)(2)(B); see, e.g., *Sheppard v. Riverview Nursing Center*, 88 F.3d 1332, 1334 (4th Cir. 1996).

[2] This Report accompanied a House version of the 1991 Civil Rights Act whose punitive damages provision differed from that of the enacted legislation only in being arguably broader. The House bill allowed punitive damages to be awarded when the defendant engaged in a discriminatory practice "with malice, or with reckless *or callous* indifference to the federally protected rights of others." House Report at 12 (emphasis added). We have no reason to think that the ultimate deletion of the words "or callous" reflected a House purpose to *expand* the scope of punitive liability.

ment of contracts. House Report at 74. See also 137 Cong. Rec. H 9527 (Nov. 7, 1991) (Interp. Memo of Rep. Edwards) ("Punitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981."). But a cross-reference to § 1981 (a statute that lacks a separate punitive damages provision) hardly counts as a firm view on the present question, for the circuits are deeply divided as to the proper standard for punitive liability under § 1981.

Four courts of appeals have held that egregious misconduct beyond mere intent to discriminate is required for punitive damages under § 1981—and had done so before enactment of § 1981a. See *Stephens v. So. Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988) (although evidence adequate to go to jury on intentional discrimination, and although any form of discrimination "constitutes reprehensible and abhorrent conduct," evidence nonetheless inadequate for punitive damages); *Beauford v. Sisters of Mercy–Province of Detroit*, 816 F.2d 1104, 1109 (6th Cir. 1987) (stating that punitive damages in civil rights actions have "generally been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant"); *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1182 (10th Cir. 1989) (upholding compensatory award, and affirming trial court's rejection of punitive damages in the absence of a showing of defendant's "personal animosity and malice" toward the plaintiff); *Walters v. City of Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986) (finding that there was adequate evidence of intentional discrimination to support jury's finding of liability under § 1981 but that defendants had not "acted with either the requisite ill will or callous disregard" to justify punitive damages).

Three other circuits have held that a finding of intentional discrimination, without more, is enough to put the question of punitive damages before the jury in the usual § 1981 case—although only two had done so at the time Congress enacted § 1981a. In *Rowlett v. Anheuser–Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987), the First Circuit applied to § 1981 a rule that "punitive damages are within the jury's discretion in cases requiring proof of intentional wrongdoing." In *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987), the Seventh Circuit appeared to say that punitive damages were available for racial discrimination under § 1981 so long as "the application of the law to the facts at hand was so clear at the time of the act that reasonably competent people would have agreed on its application."[3] And recently we held that the jury's (sustainable) "finding of intentional racial discrimination permitted it to find" the requisite ill will or reckless or callous indifference for punitive damages in a § 1981 case. *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995).

In fact, the House Report reflects this circuit split by citing two illustrative cases decided under § 1981—one of which, *Rowlett*, 832 F.2d at 205, supports Kolstad's position, while the other, *Beauford*, 816 F.2d at 1109, supports ADA's position. See House Report at 74. Perhaps the House Report could be said to invite each circuit to follow its own view of § 1981 in construing § 1981a, but such an approach seems unduly self-referential—and we note that at least two circuits have already rejected it. Both the First and the Seventh Circuit have endorsed a low threshold for punitive liability under § 1981, yet both appear to set a higher standard for

[3] The position of the Seventh Circuit on the availability of punitive damages under § 1981 is not wholly clear. *Williamson* appears to permit automatic imposition of punitive damages with limited allowance for a defendant's mistake on an obscure issue of law. However, in *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985), the court held that "[i]n a section 1981 action, a finding of liability for discrimination against a defendant does not automatically entitle the prevailing plaintiff to an award of punitive damages," and described the basis for punitive damages in terms of "outrageous conduct" and the "defendant's ill will against the plaintiff." And in *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986), the court upheld the verdict of intentional discrimination, finding the case basically a "swearing contest," and then upheld the award of punitive damages, but only after characterizing it as "a close ca[illegible]." Unless there was a higher evidentiary standard for punitive damages, it is hard to see why that case was "close" and the liability issue not.

punitive than for compensatory liability under § 1981a. Compare *Rowlett*, 832 F.2d at 205, with *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 507–09 (1st Cir. 1996); and compare *Williamson*, 817 F.2d at 1296, with *Emmel v. Coca-Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996). Those courts' approach to § 1981a seems quite sound; the Report's indifferent citation to two antithetical opinions cannot reflect a focus on their exact meaning.

Significantly, even the cosponsors of § 1981a do not seem to have taken an expansive view of the availability of punitive damages under § 1981. "Under 42 U.S.C. § 1981, victims of intentional racial and ethnic discrimination are entitled not only to equitable relief, but also to compensatory damages. Further, *in egregious cases*, punitive damages may also be awarded." 137 Cong. Rec. S 15483 (Oct. 30, 1991) (Sponsors' Interp. Memo) (emphasis added).

Finally, the House Report also cites the Supreme Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983); see House Report at 74. More specifically, the Report includes a "pin cite" to the concluding passage of *Smith*, 461 U.S. at 56, in which the Court announced that "a jury may be permitted to assess punitive damages in an action under [42 U.S.C.] § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." That Congress ultimately enacted language similar to that employed in *Smith v. Wade* is clear; we now turn to the implications of that decision for our question.

Kolstad asks us to draw from *Smith v. Wade* the broad principle that the issues of compensatory and punitive liability must go to the jury on the same evidentiary standard in civil rights cases. But we do not read that decision—much less the House Report's isolated citation to *Smith*'s linguistic formula—to go so far. In *Smith*, an inmate sued a prison guard (among others) under 42 U.S.C. § 1983, alleging that the guard violated his Eighth Amendment rights by failing to protect him from violent physical and sexual abuse. The sole dispute was over the proper standard for punitive damages,

and because § 1983 makes no reference to such a remedy, the Court looked to common law for the answer. It rejected the proposition that "actual malicious intent—'ill will, spite, or intent to injure,'" *id.* at 37, was required for punitive damages, and held instead, as noted above, that they were allowable when the defendant's conduct was "motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others." *Id.* at 56.

The Court in *Smith* noted at the outset that *compensatory* damages had been assessed at trial on an extremely demanding standard, one which itself incorporated a requirement of egregiousness:

> In this case, the jury was instructed to apply a high standard of constitutional right ("physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities"). It was also instructed, under the principle of qualified immunity, that Smith could not be held liable at all unless he was guilty of "a callous indifference or a thoughtless disregard for the consequences of [his] act or failure to act," or of "a flagrant or remarkably bad failure to protect" Wade.

Id. at 50–51. Thus, while the criterion adopted by the Court for punitive damages was not egregious in relation to the applicable compensatory standard, it clearly was so in relation to ordinary tortious conduct. Any of the discriminatory acts penalized by § 1981a is deplorable and wrong, but not all rise (or sink) to equivalence with "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." Thus the decision in *Smith* supports rather than refutes the idea that some form of egregiousness is essential for punitive damages.

In fact, the Court made clear that "deterrence of future *egregious conduct* is a primary purpose . . . of punitive damages." *Id.* at 49 (emphasis added). It invoked common law standards using such terms as "injury . . . inflicted maliciously or wantonly," "criminal indifference to civil obligations," *id.* at 41 (quoting *Philadelphia, W. & B. R. Co. v. Quigley*, 62

U.S. 202, 214 (1859)), "wilful misconduct," and "conscious indifference to consequences," *id.* at 42–43 (quoting *Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489, 495 (1876)). Tellingly, the Court drew its formulation of the appropriate standard for punitive damages from the Restatement of Torts, which says that punitive damages are allowable "for *conduct that is outrageous*, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1977) (emphasis added). The *Smith* Court quoted the Restatement's observation that punitive damages are awarded "to punish [the defendant] for his *outrageous conduct* and to deter him and others like him from similar conduct in the future." *Id.* § 908(1) (quoted in *Smith*, 461 U.S. at 54) (emphasis added). The comments to Section 908 add that punitive damages are only appropriate where there is "some element of outrage similar to that usually found in crime." *Id.*, comment b. See also *id.*, comment d (although award of punitive damages left to jury discretion, "[i]t is error ... to award punitive damages if there has been no bad motive or wanton indifference").

The Court itself has since recognized that even in its § 1983 context the *Smith* formula will commonly generate two tiers of liability. In a later § 1983 case in which a trial court's instructions had allowed the jury to include an impermissible element in calculation of compensatory damages, the Court considered whether the award could nonetheless be saved by recharacterizing it as punitive damages. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986). The Court rejected this view, noting that punitive damages "are available only on a showing of the requisite intent," and citing as examples both *Smith* and the jury instructions in the case before it, which "authoriz[ed] punitive damages for acts 'maliciously, or wantonly, or oppressively done'." *Id.*

In short, then, we construe *Smith* as establishing a threshold requirement of egregiousness for the imposition of punitive damages in § 1983 cases—a requirement which Congress transferred largely intact to § 1981a(b)(1). This case does not require us to define this requirement with specificity, for

the evidence presented by Kolstad, as we will discuss shortly, fails to show egregiousness in any form. We think, however, that punitive damages would properly reach the jury where, for example, the evidence shows that the defendant engaged in a pervasive pattern of discriminatory acts, or manifested genuine spite and malevolence,[4] or otherwise evinced a "criminal indifference to civil obligations," *Smith*, 461 U.S. at 41 (quoting *Philadelphia, W. & B.R. Co. v. Quigley*, 62 U.S. 202, 214 (1859)).

One might agree with this characterization of egregiousness and still contend that the determination of that threshold in individual cases has been entrusted by *Smith*—and hence derivatively by § 1981a(b)(1) as well—to the jury's "discretionary moral judgment." *Smith*, 461 U.S. at 52. We do not think § 1981a(b)(1) upsets the traditional relationship between court and jury in this fashion. Nor, in fact, do we think *Smith* itself granted unfettered discretion to juries to determine whether the minimum requirements for punitive damages have been met. The Court in *Smith* correctly pointed out that punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct." 461 U.S. at 52. Rather, as the Eighth Circuit recently said in a § 1983 case, "punitive damages are awarded or rejected in a particular case at the discretion of the fact finder *once sufficiently serious misconduct by the defendant is shown.*" *Coleman v. Rahija*, 114 F.3d 778, 787 (8th Cir. 1997) (emphasis added). The *Smith* Court said that the jury retains "discretionary moral judgment" over the award of punitive damages, but this simply restates the commonplace that the jury can choose *not* to award them even when the evidence is sufficient to give it the choice. And indeed, none of the

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[4] The dissent for some reason equates our use of "malevolence" with the statutory term "malice," Dissent at 12, but as the Supreme Court made clear in *Smith*, such an equation is far from automatic. 461 U.S. at 41 n.8. To the extent that the reference to "malice" does mean malevolence, of course, the doctrine of *noscitur a sociis*—which counsels courts to construe statutory terms in harmony with the words that accompany them—argues against the dissent's broad reading of "reckless indifference."

authorities cited in *Smith* in support of the "discretionary moral judgment" proposition goes so far as to deny the court's traditional role in deciding whether a reasonable juror could find the defendant's conduct sufficiently egregious for the punitive damages issue to be submitted to the jury in the first instance. See, e.g., *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1277–78 n.15 (3d Cir. 1979) (*en banc*) ("Although *the underlying conduct must be outrageous to sustain liability* [for intentional infliction of emotional distress], the factfinder may conclude, on the record in a particular case, that exemplary damages would not be warranted.") (emphasis added) (cited in *Smith v. Wade*, 461 U.S. at 52 n.14).

Lower courts have consequently read *Smith* as establishing a legal standard of egregiousness that must be met before the issue of punitive damages may go to the jury in a § 1983 case. See, e.g., *Coleman*, 114 F.3d at 788 (upholding award of compensatory damages but finding that the defendant's "conduct in this case was not sufficiently egregious to justify the imposition of punitive damages"); *Cornell v. Woods*, 69 F.3d 1383, 1391 (8th Cir. 1995) (affirming liability for intentional violation of plaintiff's clearly established First Amendment rights, but holding that defendants' conduct, "though certainly not to be commended, did not rise to a level of egregiousness sufficient to justify the imposition of punitive damages"); *Ivey v. Wilson*, 832 F.2d 950, 958 (6th Cir. 1987) (citing *Smith v. Wade* in reversing jury award of punitive damages in § 1983 case); *Soderbeck v. Burnett County*, 752 F.2d 285, 289 (7th Cir. 1985) (holding that defendant's politically motivated firing of plaintiff was enough to subject him to compensatory but not punitive damages); *Lavicky v. Burnett*, 758 F.2d 468, 477 (10th Cir. 1985) (affirming judgment of liability for intentional violation of plaintiff's Fourth, Fifth, and Fourteenth Amendment rights but holding that "there was no evidence of malice, wantonness or oppressiveness to justify punitive damages"); *Wulf v. City of Wichita*, 883 F.2d 842, 867 (10th Cir. 1989) (affirming § 1983 liability for termination motivated by plaintiff's protected speech, but reversing award of punitive damages, holding that "not every intentional violation of a

plaintiff's constitutional rights subjects a defendant to punitive damages").

There was, of course, no separate punitive damages provision in § 1983 for the Court to interpret in *Smith*. Our task in this case is to construe a comprehensive statutory scheme that includes a separate standard for punitive damages. For Congress to have enacted the statutory terms of § 1981a(b)(1) merely as guidelines to channel the jury's otherwise unchecked discretion would be quite a novelty. We know of no other statutory provision that functions that way. Congress writes laws; we do not casually assume it to have done nothing more than draft jury instructions. Indeed, it is difficult to imagine where one would look to find standards that operate *as a matter of law* if not to the laws that Congress has duly enacted.

The House Report lends support to this common sense view. In speaking of the "even higher standard" the plaintiff "must meet" to get punitive damages, the Report appears to assume that the legislation will function in the normal way: by establishing a legal standard, not simply a verbal formulation to be pondered by juries with no role for the trial court. Thus, the Report notes that the § 1981a(b)(1) limitation, among others, "serve[s] to check jury discretion in awarding such damages." House Report at 72.

Kolstad contends that our insistence on preserving two meaningful tiers of liability across the range of Title VII cases is undercut by two Supreme Court opinions, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which together rejected an egregiousness requirement for "liquidated damages" under the Age Discrimination in Employment Act. But liquidated damages under the ADEA and punitive damages under Title VII are not twins. To begin with, the relevant language is different: the ADEA requires "willful" conduct, not "malice" or "reckless indifference." 29 U.S.C. § 626(b).

Further, under the ADEA liquidated damages are double damages; that is, they are always equal in amount to the

compensatory award. See 29 U.S.C. § 216(b). By contrast, although the sum of compensatory and punitive damages is capped in absolute terms under Title VII, the proportion of punitive to compensatory damages is statutorily unconstrained. Thus in an individual case the ratio may be astronomical—in principle infinite, if no compensatory damages are awarded. It is one thing to award numerically equal compensatory and liquidated damages on the basis of the same conduct (the concept of double or treble damages for a single violation is not an unfamiliar one); it is quite another to leverage a compensatory award into a punitive award that is ten or a hundred times greater, with no showing of heightened culpability.

We turn next to the reading of the statute proposed by the dissent, though not by Kolstad—a reading which preserves the form of a two-tiered structure but scarcely the substance. The argument runs as follows: Punitive damages are available when the defendant displays reckless indifference to the plaintiff's federally protected rights. If the scope or nature of a given right is sufficiently obscure, a defendant might intentionally discriminate but be merely negligent as to the existence of the right. Such a defendant would be subject to compensatory but not punitive damages. This approach in effect carves out a mistake-of-law defense to punitive liability.

We find it extremely unlikely that Congress meant to codify a mistake-of-law defense through § 1981a(b)(1), much less that it did so in "plain language," as the dissent repeatedly insists. Dissent at 1, 2, 5, 9. Contrary to the dissent's confident assurances, we find the formulation Congress chose—"with malice or with reckless indifference to the federally protected rights of an aggrieved individual"—to be an unusually imprecise and roundabout way of articulating a mistake-of-law defense. Of course there is no principle that Congress must pick the clearest or most direct expression of its standards. But the ornateness of the reasoning needed to read the section as giving juries discretion to award punitive damages for all knowing violations of Title VII, in relation to simplicity of the language Congress might have used to

achieve that result, makes such a reading extremely improbable.[5]

The improbability only increases when one reflects that the class of disparate treatment cases that could escape exposure to punitive damages on the dissent's theory is small, perhaps vanishingly so. The prohibition against basing employment decisions on sex, race, and other impermissible factors is pervasive and well understood, as the dissent itself observes. See Dissent at 5 (noting that "the statute and its prohibition against discrimination are well known to employers"). In the typical intentional discrimination case an employer could not plausibly argue that it was merely negligent as to the law's command. Nor do employers often (or advisedly) defend on the sincere but mistaken basis that religion, sex, or national origin constitutes a bona fide occupational qualification, and as a matter of law they may never make such a claim for race. See 42 U.S.C. § 2000e–2(e). Indeed, the relative implausibility of such "good faith" defenses in the Title VII context reveals another feature that distinguishes this case from *Thurston* and *Hazen*. Given the widespread belief among employers that age can sometimes be a bona fide occupational qualification—a belief reflected in mandatory retirement programs—the Supreme Court could reasonably suggest in *Hazen* that its broad reading of "willful" would not frustrate any legislative intention to create "two tiers of liability across the

[5] The dissent claims to find additional support in a phrase snatched from the crossfire in *Smith v. Wade* between Justices Brennan and Rehnquist, namely Justice Brennan's reference to "the defendant's subjective consciousness of risk . . . of *unlawfulness*." Dissent at 2 (quoting *Smith*, 461 U.S. at 38 n.6 (emphases altered by dissent)). The full sentence reads: "Justice Rehnquist consistently confuses, and attempts to blend together, the quite distinct concepts of *intent to cause* injury, on one hand, and *subjective consciousness* of risk of injury (or of unlawfulness) on the other." *Smith*, 461 U.S. at 38 n.6. (emphases in original). In short, the Court's treatment of consciousness of unlawfulness was, quite literally, parenthetical.

range of ADEA cases." 507 U.S. at 616. Such a suggestion would be far weaker in relation to religion, sex, or national origin discrimination under Title VII and completely out of place for the race component. If § 1981a(b)(1) does nothing more than establish a narrow mistake-of-law defense, then every garden-variety disparate treatment case qualifies for both compensatory and punitive damages—a result, as we have already said, that seems hard to square with Congress's chosen structure and language.

In its effort to show that its approach would not obliterate the difference in standards between compensatory and punitive exposure under Title VII, the dissent places considerable emphasis on the scenario involving "an attenuated agency relationship" between an employer/defendant and an employee who intentionally discriminates. Dissent at 7.[6] But even in such cases the dissent does not argue that its approach would produce a meaningful two-tiered system, in which a significant fraction of cases would go to the jury on compensatory but not punitive damages. Instead, it simply serves up another helping of the "discretionary moral judgment" argument—predicting that when "the jury focuses on the employer's ... awareness of its legal obligation," *id.*, it may be swayed by evidence that the employer has hired Title VII-sensitive managers or has provided punctilious equal employment opportunity training. Perhaps juries would be so swayed under the dissent's approach, but that does not answer the question of what legal standard Congress meant to establish by enacting § 1981a(b)(1). And as we have already noted, any test that makes the difference between compensatory and punitive exposure depend on the employer's awareness of Title VII's legal mandates is likely to produce only a negligible set of cases in which compensatory but not punitive damages are available.

[6] It is unclear just why the dissent uses the word "attenuated" to characterize the agency relationships on which it focuses. The acts the dissent goes on to describe—discriminatory "hiring or firing decision[s]," Dissent at 7–8—are "company acts" that do not involve an unusual degree of attenuation between employer/defendant and employee/wrongdoer. These are precisely the sorts of cases in which employers' claims to have misunderstood the extent of their legal obligations are least plausible.

Just as important, the dissent never explains why it believes "[a]ttribution of employee state of mind differs when the jury turns to the question of punitive damages." Dissent at 7. In Title VII cases, the defendant is the employer, and an employer is liable for "company acts"—hirings, firings, promotions, demotions—performed by employees within the scope of their employment.[7] If those acts amount to intentional discrimination, the employer is subject to compensatory damages; if the acts satisfy the requirements of § 1981a(b)(1), the employer is subject to punitive damages. There is nothing in the language of § 1981a(b)(1) that would derail this standard presumption of respondeat superior for company acts—and certainly that provision contains no clear textual invitation for courts to explore the "employer's awareness," Dissent at 8, whatever that indeterminate phrase might mean. In short, we fail to see how the dissent's special new rule of imputation for punitive damages finds any grounding in the statute's "plain language."

We note in conclusion that our decision today aligns us with all but one of the several circuit courts to address this question. See *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996) (endorsing concept of a higher standard for punitive damages under § 1981a, and noting that such damages "are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future"); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997) (holding that under § 1981a, "[p]unitive damages are an extraordinary remedy, to be reserved for egregious cases," and "are not an element of recovery in every case involving an intentional tort") (citation omitted); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (despite sufficiency of evidence for liability and "duplicitous" actions of defendant's employees, evidence held insufficient for punitive damages); *Emmel v. Coca–Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996) (characterizing standard for punitive damages as a "higher hurdle"

[7] We need not address the scope of employer liability for "non-company acts" such as sexual harassment.

than that for proving the underlying discrimination);[8] *Karcher v. Emerson Electric Co.*, 94 F.3d 502, 509 (8th Cir. 1996) (although jury could properly infer intentional sex discrimination from inconsistent nature of hiring process and failure to select and train women, it could not find malice or deliberate indifference); *Ngo v. Reno Hilton Resort Corp.*, 1998 WL 162166 (9th Cir. Apr. 9, 1998) (requiring "evidence of conduct more egregious than intentional discrimination to support an award of punitive damages in Title VII cases"); but see *Luciano v. Olsten Corp.*, 110 F.3d 210, 219–20 (2d Cir. 1997) (finding that no additional evidence is required for punitive liability).

The evidence in this case does not show the kind of egregious discriminatory conduct necessary for the imposition of punitive damages. As the district court noted, 912 F. Supp. at 14–15, the jury's finding of discrimination appears to have been premised largely if not exclusively upon its apparent rejection, as mere pretext, of ADA's proffered rationales—that Kolstad's legislative experience and writing skills were inadequate. Whether such a rejection, by itself, is enough to support an award of *compensatory* damages is a question for a different *en banc* proceeding, see *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997), vacated pending rehearing *en banc*, 124 F.3d 1302 (D.C. Cir.

[8] As with § 1981, the position of the Seventh Circuit on this question is not simple to characterize. The *Emmel* decision comports with the approach we take today, as do *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1132 (7th Cir. 1997) (holding that evidence of egregiousness is required for punitive damages, since otherwise "every employment discrimination claim [could] include a punitive damage award because every employment discrimination plaintiff must demonstrate an intentional unlawful discrimination"), and *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1126–27 (7th Cir. 1996) (plaintiff who had already received compensatory damages not entitled to punitive damages because employer did not act recklessly or maliciously). But *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 581–82 (7th Cir. 1996), a case which arose under both Title VII and § 1981, appears to point in the opposite direction.

1997), but in this case it falls far short of supplying grounds for a punitive award.[9]

There was substantial evidence to indicate that Spangler was pre-selected for the promotion, and that Kolstad was never seriously in the running. Evidence of pre-selection may of course be "relevant to the question of discriminatory intent" insofar as an employer's departure from its own hiring and promotion procedures might suggest that the reasons it advances for its actions are pretextual. *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984). But pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful. Indeed, where the selection is to be made from among a narrow band of current employees well known to the selectors, it is hard to see how there could not be a substantial degree of pre-selection—unless the decision-makers were asleep at the switch or the candidates' track records were virtually identical. The dissent lingers over the evidence concerning the process by which Spangler was promoted, see

[9] Given that a large portion of the dissent is devoted to attacking positions that the Court does not adopt, see Dissent at 11–17, we take pains here to state expressly what should be evident from a straightforward reading of our opinion. While it is true that many plaintiffs, like this one, who can offer only weak evidence of discrimination will not be able to provide any evidence at all of egregious conduct, nothing we say precludes the possibility of sparse, but nonetheless adequate, evidence of egregious discrimination. And our position in no way "amount[s] to little more than a requirement of direct rather than circumstantial evidence of discrimination as a prerequisite for punitive damages." *Id.* at 13. The showing of egregious discrimination necessary for an award of punitive damages, like any other element of a plaintiff's case, may be made through circumstantial as well as direct evidence. Nor do we hold that punitive damages may not be considered in pretext-only cases, see *id.* at 14–17, though legitimate punitive awards in such cases do seem improbable. The reasoning behind this predictive judgment is simple: a plaintiff who can demonstrate that her employer engaged in truly outrageous acts of discrimination will generally be able to offer some evidence probative of the employer's illicit motivations, rather than merely resting on a finding that its claimed motivations were unworthy of belief.

Dissent at 15–16, but the only evidence it adduces to show ADA's knowledge of "the impropriety of preselection" is a consent decree—expired at the time of the operative events—under which ADA undertook not to engage in the practice. *Id.* at 16. It scarcely bears repeating that "a consent decree is a form of contract," *Richardson v. Edwards*, 127 F.3d 97, 101 (D.C. Cir. 1997), not a statement of what the law considers wrongful. Consequently, evidence of pre-selection is relevant only insofar as it logically supports an inference of discriminatory intent, i.e., trivially at best. For the same reason we reject Kolstad's fallback position that we should remand for a new trial on punitive damages with a direction that the trial court admit the consent decree into evidence.

The only evidence that pointed toward gender bias was Kolstad's testimony that Wheat told sexually offensive jokes at staff meetings and on occasion used derogatory terms to refer to prominent professional women. But Wheat, as mentioned above, did not make the decision to promote Spangler over Kolstad; Allen did. In any event, sexist remarks, tasteless and lamentable though they may be, are "not always conclusive of sex discrimination." *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1513 (D.C. Cir. 1995). Wheat's statements standing alone do not form an adequate basis for an award of punitive damages.

The judgment of the district court on the matter of punitive damages is

Affirmed.

RANDOLPH, *Circuit Judge, concurring*: The interpretative problem in this case starts with the interplay of the words "intentional discrimination," which suffices for compensatory damages, 42 U.S.C. § 1981a(a), and "reckless indifference," which along with the alternative "malice" is a prerequisite for punitive damages, *id.* § 1981a(b)(1). The judicial mind naturally tends to view these words against a legal background, here a Supreme Court decision defining "malice" to include recklessness, *Smith v. Wade*, 461 U.S. 30, 39 & n.8 (1982); and the common legal notion, as expressed in the MODEL PENAL CODE § 2.02(5), that "[w]hen recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly." If one fed this data into a parsing machine, it would answer—§ 1981a(a)'s standard for compensatory damages subsumes § 1981a(b)(1)'s standard for punitive damages, or whenever there is intentional discrimination there is at least reckless disregard. Yet one cannot help wondering why Congress would have enacted two separate provisions when one would have sufficed, and why all employers liable under § 1981a(a) should be swept within § 1981a(b)(1). Those who voted for this legislation surely must have believed that they were voting for a two-tiered damages system, as the majority opinion describes it. If the dissent is nevertheless correct in its interpretation, the punitive damages subsection must be the product of a very clever draftsman, someone who wanted to convey the appearance of limiting punitive damages to exceptional cases, while hoping that courts would draw upon other legal sources to find the limitation an illusion. Despite the dissent's linguistic points, the majority opinion convinces me that Congress wanted the subsections kept separate, that it intended punitive damages to be reserved for only the worst cases. The structure of § 1981a certainly points in that direction, as do the historical materials, the policies promoted by punitive damages and the other factors skillfully marshalled in the majority opinion. Although the matter is exceedingly close, I also believe the language of § 1981a(b)(1) will bear the meaning the majority opinion ascribes to it. I therefore concur.

TATEL, *Circuit Judge, with whom* EDWARDS, *Chief Judge,* WALD, ROGERS, *and* GARLAND, *Circuit Judges, join, dissenting*: A jury found that the American Dental Association ("ADA") intentionally discriminated against Carole Kolstad on the basis of sex when it denied her a promotion in favor of a male candidate. Under the Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(1) (1994), victims of intentional employment discrimination who demonstrate that the employer acted "with malice or with reckless indifference to [their] federally protected rights" may recover punitive damages. This court now holds that Congress meant to require something more serious than intentional discrimination—some undefined quantum of egregiousness—before a jury may consider punitive damages. Because this amorphous requirement nullifies the plain language of section 1981a(b)(1)'s reckless indifference standard, and because it conflicts with Supreme Court decisions in *Smith v. Wade*, 461 U.S. 30 (1983), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), I respectfully dissent.

I

Asserting that Congress "did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII," Maj. Op. at 5, the court declares that the evidence supporting punitive damages "must exceed what is needed to show intentional discrimination," *id.* If Congress had wanted to require something more serious than intentional discrimination, however, it would have limited section 1981a(b)(1) to "malice," or it would have written the statute to require "malice or egregiousness." But section 1981a(b)(1) never mentions egregiousness. Instead, it allows the jury to consider punitive damages if the employer acts not only with malice, but also with "reckless indifference to ... federally protected rights." Because this court's duty is to "give effect, if possible, to every clause and word of [the] statute," *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997) (internal quotation marks omitted), we may not ignore the reckless indifference standard, but must interpret it as written by Congress. *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 938–40 (1998).

According to its plain language, section 1981a(b)(1)'s "reckless indifference" threshold for punitive damages focuses on the employer's awareness of "federally protected rights." In *Smith v. Wade*, from which Congress drew section 1981a(b)(1)'s language, *see* H.R. REP. No. 102–40, pt. 1, at 74 (1991) (citing *Smith*), Justice Brennan's opinion for the Court referred to this inquiry as a measure of the defendant's "subjective consciousness of risk ... of *unlawfulness*." *Smith*, 461 U.S. at 38 n.6 (emphases altered). As this court said in a different context, " 'the wrongdoer must consciously be aware of his wrongdoing, *i.e.*, the actor must not only intend to do the act found to be wrongful, but also must know that his conduct is wrongful.' " *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668 (D.C. Cir. 1996) (emphasis omitted) (quoting *In re Korean Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135, 1136 (D.D.C. 1988)).

Although the details of the recklessness standard remain open to debate, *see* Maj. Op. at 6 (citing *Saba*, 78 F.3d at 668–69, and *United States v. Krizek*, 111 F.3d 934, 941 (D.C. Cir. 1997)); *cf. Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994) (discussing objective and subjective tests for reckless disregard), its basic contours are well settled; the language of section 1981a(b)(1) is not the blank slate that the court seeks to make of it. Whether relying on the employer's mental state (*Saba*) or inferring recklessness from the entire record (*Krizek*), a jury can award punitive damages under section 1981a(b)(1) if the employer either knew of Title VII's prohibitions and acted regardless or disregarded a substantial risk of violating the statute. *Cf.* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (5th ed. 1984) (noting that the "usual meaning" of "reckless" is that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow").

The court and concurring opinion reject the statute's reckless indifference standard because they view it, mistakenly in my view, as "subsumed" by section 1981a(a)'s liability determination. When the jury determines liability in a Title VII disparate treatment case, it considers only whether the em-

ployer made the challenged employment decision "because of" the plaintiff's race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e–2. The employer's awareness of its legal obligations plays no role. In this case, for example, the verdict in Kolstad's favor, a verdict unanimously affirmed by the panel and not now before this court, rested solely on the jury's conclusion that ADA denied Kolstad the promotion because of her sex. ADA's liability for punitive damages, by comparison, turns on its awareness of its legal obligations: When it denied Kolstad the promotion because of sex, did it intend to violate Title VII? Did it know of its legal obligations yet recklessly disregard them? Or can reckless indifference to federally protected rights be inferred from the entire record?

Criticizing this reading of the Act, the court says that "any test that makes the difference between compensatory and punitive exposure depend on the employer's awareness of Title VII's legal mandates is likely to produce only a negligible set of cases in which compensatory but not punitive damages are available." Maj. Op. at 18. Quite apart from its entirely speculative nature, this statement disregards the fact that section 1981a(b)(1), by focusing specifically on whether the employer acted with "reckless indifference . . . to federally protected rights," in fact makes the difference between compensatory and punitive damages "depend on the employer's awareness of Title VII's legal mandates."

In addition to appearing nowhere in section 1981a, the court's new egregiousness requirement conflicts with *Smith v. Wade*'s holding that "a jury may be permitted to assess punitive damages in an action under [42 U.S.C.] § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others," *Smith*, 461 U.S. at 56. Rejecting the notion that punitive damages under section 1983 require anything as egregious as "actual malicious intent—'ill will, spite, or intent to injure,'" *Smith*, 461 U.S. at 37, the Court noted that the majority common law rule recognizes that "punitive damages in tort cases may be awarded not only for actual intent to injure or

evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence," *id.* at 48. Although citing the Restatement (Second) of Torts' view that punitive damages "punish [the defendant] for his outrageous conduct," RESTATEMENT (SECOND) OF TORTS § 908(1) (1979), *quoted in Smith*, 461 U.S. at 54, *Smith* actually draws its standard for punitive damages from the Restatement's subsequent explanation that conduct can be outrageous "because of the defendant's evil motive *or his reckless indifference to the rights of others*," *id.* § 908(2) (emphasis added), *quoted in Smith*, 461 U.S. at 46–47.

Smith also rejected the proposition, central to my colleagues' interpretation of section 1981a, that "the threshold for punitive damages should always be higher than that for liability in the first instance," *Smith*, 461 U.S. at 38; *see also id.* at 51–54. According to *Smith*, the reckless indifference threshold for punitive damages "applies even when the underlying standard of liability for compensatory damages is one of recklessness." *Id.* at 56.

The Supreme Court reached the same result under the Age Discrimination in Employment Act ("ADEA"), notwithstanding that statute's "two-tiered scheme of liability," Maj. Op. at 6. Interpreting the term "willful" as used in the ADEA, the Court held that an employer should be assessed liquidated damages, the statute's equivalent of punitive damages, if it "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985) (quoting *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). Lower courts, concerned that the reckless disregard standard "would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct," *Hazen Paper*, 507 U.S. at 615–16, added just the kind of heightened culpability requirement that my colleagues now read into section 1981a, *see id.* at 615 (citing, *e.g.*, *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 57–58 (3d Cir. 1989), which allowed liquidated damages only if employer's conduct was

"outrageous"). Flatly rejecting these decisions, *Hazen Paper* holds that "[t]he ADEA does not provide for liquidated damages 'where consistent with the principle of a two-tiered liability scheme.' It provides for liquidated damages where the violation was 'willful.' ... Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous." *Id.* at 616–17.

Read in light of *Smith* and *Hazen Paper*, section 1981a's plain language thus leaves no doubt that juries may consider punitive damages on the basis of evidence showing nothing more than "reckless indifference to ... federally protected rights." Moreover, even though the liability determination (Did the employer intentionally take account of sex?) differs from the reckless indifference inquiry (When the employer intentionally discriminated, was it aware of its legal obligations?), proof of unlawful intentional discrimination can also demonstrate reckless indifference to federally protected rights. Considering that Congress passed the Civil Rights Act over three decades ago, that the statute and its prohibition against discrimination are well known to employers, that many companies have instituted Title VII compliance programs, and that an industry of equal employment opportunity consultants and attorneys is readily available to employers in need of assistance, a jury could reasonably conclude that an employer nevertheless refusing to hire or promote a woman because of sex is worthy of punishment.

This does not mean, as the court fears, that juries will automatically award punitive damages in every Title VII disparate treatment case. Punitive damages "are never awarded as of right, no matter how egregious the defendant's conduct." *Smith*, 461 U.S. at 52. If a jury believes that an employer has acted maliciously or with reckless indifference to a plaintiff's federally protected rights, it then decides whether to punish the defendant, a determination the law leaves to the jury's "discretionary moral judgment." *Id.* Although a jury exercising its moral discretion might conclude that an employer recklessly indifferent to federally protected rights deserves punishment, a jury could also reach the opposite conclusion, that because of extenuating circumstances—*e.g.*, the employer had no history of discrimination, showed remorse, or had already taken steps to rectify the injury—the employer should not have to pay punitive damages.

Because liability and punitive damages require distinct inquiries, moreover, employers found to have intentionally discriminated in employment in violation of federal law may introduce evidence to demonstrate that they did everything they could to comply with the law and were therefore not recklessly indifferent to their legal obligations. In *Trans World Airlines, Inc. v. Thurston*, for example, the Supreme Court held that employers who intentionally violate the ADEA may nevertheless avoid liquidated damages by demonstrating that they attempted "reasonably and in good faith" to comply with the law. *Thurston*, 469 U.S. at 129. Although finding that TWA's mandatory retirement policy violated the Act, the Court denied plaintiffs liquidated damages because, by seeking legal advice and consulting with the union, TWA demonstrated that it had not acted in " 'reckless disregard' of the requirements of the ADEA." *Id.* at 130. *Cf., e.g., Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997) (noting "that the institution of a written sexual harassment policy goes a long way towards dispelling any claim about the employer's 'reckless' or 'malicious' state of mind").

For similar reasons, employers found to have intentionally discriminated in violation of Title VII may be able to persuade a jury that they had acted without reckless indifference; employers may even be able to convince a judge to remove the question of punitive damages from jury consideration altogether. For example, evidence that an employer erroneously used religion, sex, or national origin as a "bona fide occupational qualification" for employment, *see* 42 U.S.C. § 2000e–2(e), or overreached in a good-faith effort to remedy the effects of past discrimination, could demonstrate that the employer acted without reckless indifference to its legal obligations. Punitive damages might be equally inappropriate where liability rests on a novel legal theory. *See, e.g., Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (denying punitive damages although holding em-

ployer liable for dismissing female employee who had contemplated an abortion, an entirely novel theory of liability); *see also Hernandez-Tirado v. Artau*, 874 F.2d 866, 870 (1st Cir. 1989) (although intentionally violating the First Amendment in a politically motivated employment decision, defendant was only "negligent [as] to the existence of a federally protected right").

Evidence sufficient to prove liability may also fall short of establishing an employer's reckless indifference to its legal obligations where the employer's liability arises from an attenuated agency relationship with an employee found to have committed an intentional act of discrimination. Because employers are responsible for injuries caused by employees acting within the scope of employment, juries considering liability in traditional Title VII cases attribute employees' intentional use of race or sex to the employer. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring in judgment) (in the typical Title VII case "when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer"); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (1958) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). Attribution of employee state of mind differs when the jury turns to the question of punitive damages. Because punitive damages are intended not to compensate the victim, but rather to punish employers for the discriminatory acts of employees, *cf. Smith*, 461 U.S. at 54 (in the punitive damages inquiry, "[t]he focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards"), the jury focuses on the employer's, not the employee's, awareness of its legal obligations. Obviously, if the person discriminating is the same as the employer—in a sole proprietorship, for example—there is no difference between the employer's awareness of its legal obligations and the employee's. But where a gap exists in the agency relationship between the agent and the entity being held liable, *i.e.*, where the employee making the hiring

or firing decision does not constitute the employer's entire decision-making apparatus, the punitive damages inquiry requires the jury to examine the *employer's* awareness of the law. An employer could thus argue that even though it had been found liable for the discriminatory acts of an employee and ordered to pay compensatory damages to the victim, it should not have to pay punitive damages because it had undertaken good-faith efforts to comply with Title VII—for example, by hiring staff and managers sensitive to Title VII responsibilities, by requiring effective EEO training, or by developing and using objective hiring and promotion standards—thereby demonstrating that it never acted in reckless disregard of federally protected rights.

This interpretation of section 1981a sets up exactly the incentives Congress intended. While Congress expected victims of intentional discrimination to be compensated for their losses, it also wanted to motivate employers to detect and deter Title VII violations. *See* H.R. REP. No. 102–40, pt. 1, at 69–70 (recounting testimony encouraging employers to design and implement effective structures to combat discrimination). Giving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes just this purpose. Employers making no such efforts will not only have to compensate victims, but may be punished for their reckless indifference to federal law.

Applying section 1981a(b)(1)'s reckless indifference standard to the facts of this case, I believe the district court should have allowed the jury to consider punitive damages. Found to have intentionally discriminated against Kolstad, ADA never argued that it made good-faith efforts to comply with the law; the case involves no novel issues of Title VII liability; and the decision to deny Kolstad the promotion was made not by a low-level employee, but by ADA's executive director. Under these circumstances, the jury should have been allowed to consider whether in denying Kolstad a promotion because of her sex ADA acted with reckless indifference to her federally protected rights.

The court spends most of its opinion struggling to avoid the plain language of section 1981a and the holdings of *Smith* and *Hazen Paper*. It begins by detecting an egregiousness standard in section 1981a's legislative history. Contentious and partisan, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994), the Act's legislative history actually manifests contradictory signals regarding congressional intent about punitive damages. As the court acknowledges, *see* Maj. Op. at 9, the House Report it relies on for a "heightened" standard cites two irreconcilable section 1981 cases—*Beauford v. Sisters of Mercy–Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir. 1987), limiting punitive damages to "egregious" cases, and *Rowlett v. Anheuser–Busch, Inc.*, 832 F.2d 194, 205–06 (1st Cir. 1987), holding that plaintiffs need prove nothing beyond intentional discrimination for juries to consider punitive damages. The court's egregiousness standard comports with *Beauford*. My interpretation of section 1981a comports with *Rowlett*. Given the clarity of section 1981a's text, we should follow the statute rather than selective bits of its confused legislative history.

Next, appearing to concede that Congress drew the language of section 1981a(b)(1) from *Smith*, *see* Maj. Op. at 10, the court then reads *Smith* to require proof of egregiousness for punitive damages, *see id.* at 12. Even if recklessly violating the Eighth Amendment is somehow more egregious than intentionally discriminating in employment on the basis of sex or race in violation of federal law, *see id.* at 11, it does not follow that because liability in *Smith* required "base, inhumane and barbaric" action, *Smith*, 461 U.S. at 32, the standard for punitive damages must always include "some form of egregiousness," Maj. Op. at 11. Like the rest of the court's opinion, its reliance on *Smith*'s underlying standard for liability rests on its failure to acknowledge that the punitive damages inquiry depends not on the seriousness of the behavior giving rise to liability, but on the defendant's awareness of its legal obligations. Both "base, inhumane and barbaric" acts (Eighth Amendment) and intentional discrimination in employment (Title VII) can be committed with "reckless indifference to . . . federally protected rights."

The court relies on *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), but nothing in that case casts doubt on *Smith*'s holding that proof of reckless indifference suffices for punitive damages. Noting in dicta that punitive damages are available on a showing of "requisite intent," *id.* at 306 n.9, *Stachura* drew the "maliciously, or wantonly, or oppressively done" standard not from *Smith*, but from the jury instruction under review in that case, *see id.* Moreover, while our sister circuits have split over the meaning of *Smith*, *compare* Maj. Op. at 14–15 (collecting cases reading *Smith* to require egregiousness), *with, e.g., Savarese v. Agriss*, 883 F.2d 1194, 1203–04 (3d Cir. 1989) (rejecting heightened culpability requirement under *Smith*); *Melear v. Spears*, 862 F.2d 1177, 1187 (5th Cir. 1989) (applying *Smith*'s reckless indifference standard without proof of egregiousness), we have consistently read *Smith*'s reckless indifference standard without adding an egregiousness requirement, *see, e.g., Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1239 (D.C. Cir. 1997) (applying *Smith* to the Fair Housing Act); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (applying *Smith* to section 1981).

My colleagues make two unpersuasive attempts to distinguish *Hazen Paper*'s clear rejection of their "two-tiers" rationale. Asserting first that the ADEA's "willful" standard has no bearing on the "malice" or "reckless indifference" required under section 1981a(b)(1), Maj. Op. at 15, the court ignores *Thurston*'s holding that "willful" conduct includes "reckless disregard," a term courts use interchangeably with "reckless indifference," *see, e.g., Williams v. Borough of West Chester*, 891 F.2d 458, 464 n.10 (3d Cir. 1989).

Second, the court points out that unlike the double damages authorized by the liquidated damages provision of the ADEA, the ratio between compensatory and punitive damages under Title VII is potentially unlimited. Maj. Op. at 15–16. This observation is interesting, but Congress chose to deal with the risk of disproportionate punitive damages

awards under Title VII by preserving judges' traditional oversight of jury discretion. *See* H.R. REP. No. 102–40, pt. 1, at 72 ("Judges serve as an additional check: they can and do reduce awards which are disproportionate to the defendant's discriminatory conduct or the plaintiff's resulting loss."). I have no doubt that district courts—and if necessary, circuit courts—have all the authority they need to correct disproportionate awards, particularly an "infinite[ly]" disproportionate award, Maj. Op. at 16, should one ever occur. Equally significant, when enacting the Civil Rights Act of 1991, Congress carefully limited punitive damages in other ways. It capped total damages at between $50,000 and $300,000 depending on the employer's size, 42 U.S.C. § 1981a(b)(3), and barred punitive damages altogether in disparate impact cases, *see id.* § 1981a(a)(1), in mixed motive cases, *see id.* § 2000e–5(g)(2), and against governmental defendants, *see id.* § 1981a(b)(1). Because Congress itself carefully cabined punitive damages, it is particularly inappropriate for this court to add a limitation not found in the language of the statute. "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so...." *Brogan v. United States*, 118 S. Ct. 805, 811–12 (1998).

III

Not only does the court's egregiousness standard conflict with the language of section 1981a and with *Smith* and *Hazen Paper*, but my colleagues offer no clear definition of the term, shifting from one interpretation to another and leaving district courts little guidance.

Egregiousness as a Measure of the Seriousness of the Discrimination

Initially, the court equates egregiousness with the seriousness of the underlying discrimination. *See* Maj. Op. at 2, 5. But unlike reckless indifference, or even malice, which also focuses on an employer's state of mind, *see, e.g., Dellums v. Powell*, 660 F.2d 802, 808 (D.C. Cir. 1981) (noting that malice is a subjective inquiry), the jury considers the seriousness of

the underlying intentional discrimination in setting compensatory damages; the more egregious the harm, the greater the compensation awarded. Of course, the egregiousness of the violation can *relate* to the punitive damages inquiry in the sense that egregious discrimination can be probative of malice or reckless indifference. To consider egregiousness in awarding punitive damages, however, the jury must make an inference not required at the liability stage: that the egregiousness of the discrimination suggests malice or reckless indifference to federally protected rights.

The court's effort to define egregiousness as a measure of the severity of discrimination suffers from several other defects. At one point, for example, the court defines egregiousness as "a pervasive pattern of discriminatory acts." Maj. Op. at 13. Not only does the court provide no support for this new standard, but exposing only those employers to punitive damages who commit multiple acts of discrimination essentially allows employers to engage in a single act of invidious discrimination without fear of punitive damages.

Offering still another definition, again without citation, the court says that egregiousness might be demonstrated by an employer's "genuine spite and malevolence." *Id.* Not content to read the reckless indifference standard out of the statute, the court here tinkers with section 1981a's other punitive damages test, suggesting that it requires not just "malice," but some kind of "genuine" malice, whatever that means.

Under any of these iterations of egregiousness-as-a-measure-of-seriousness, it is entirely unclear how district judges will determine when intentional discrimination is sufficiently non-egregious to take the issue from the jury. Never offering a clear answer, the court leaves it to district courts to decide for themselves whether an employer's conduct is worthy of punishment, thus allowing judges to usurp the jury's exercise of moral judgment.

Egregiousness as a Measure of the Plaintiff's Evidence

Applying its egregiousness standard to the facts of this case, *see id.* at 20–22, the court shifts from using egregious-

ness as a reflection of the seriousness of the discrimination to a measure of the strength of Kolstad's proof. According to the court, the "only evidence that pointed toward gender bias was Kolstad's testimony that Wheat told sexually offensive jokes at staff meetings and on occasion used derogatory terms to refer to prominent professional women." *Id.* at 22. "Wheat's statements standing alone," the court says, "do not form an adequate basis for an award of punitive damages." *Id.*

Amounting to little more than a requirement of direct rather than circumstantial evidence of discrimination as a prerequisite for punitive damages, the court's approach conflicts with *Hazen Paper*, 507 U.S. at 615 (rejecting requirement of *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989), that underlying evidence of liability be direct before allowing liquidated damages). It also conflicts with this circuit's case law holding that at least with respect to proof of liability, circumstantial evidence can be as probative as direct evidence. *See, e.g., Crawford–El v. Britton*, 93 F.3d 813, 818 (D.C. Cir. 1996) (en banc) (Williams, J.) ("[T]he distinction between direct and circumstantial evidence has no direct correlation with the strength of [a] plaintiff's case."), *rev'd on other grounds*, No. 96–827, 1998 WL 213193 (U.S. May 4, 1998); *cf. Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997) ("'[D]irect' evidence [in the Title VII mixed motive context] may be circumstantial in nature, so long as it establishes that discriminatory motive played a substantial role in the employment decision."). I see no reason why the same rule should not apply to proof of punitive damages, particularly since the presence or absence of direct evidence of intent is not necessarily an accurate measure of blameworthiness. Why, for example, is an employer who leaves behind clear evidence of its intentional, discriminatory refusal to promote one woman—"these are jobs for men"—more worthy of punishment than an employer who subtly, but equally intentionally, refuses to promote an entire class of women? Under the court's direct evidence rule, employers who effectively cover up evidence of their discriminatory intent will escape punitive

damages no matter how egregious their discrimination. Congress, acting to strengthen Title VII in the Civil Rights Act of 1991, could not have intended such a nonsensical result.

Egregiousness as a Requirement of More than Mere Pretext

Acknowledging that we are considering the question of whether rejection of a proffered nondiscriminatory rationale by itself can support a finding of intentional discrimination in a different *en banc* case, *see* Maj. Op. at 20 (citing *Aka v. Washington Hosp. Ctr.*, 116 F.3d 876 (D.C. Cir.), *judgment vacated pending reh'g en banc*, 124 F.3d 1302, 1302 (D.C. Cir. 1997)), the court says that in this case such evidence "falls far short of supplying grounds for a punitive award," *id.* at 21. Although punitive damage awards in pretext-only cases may be "improbable," *id.* at 21 n.9, the court's premise is entirely unsupported by the record. Properly reviewed, the evidence in this case demonstrates that the jury's verdict could have rested on much more than rejection of the employer's proffered nondiscriminatory justification. This court's job is not to weigh the evidence, as my colleagues seem to have done, but to view the evidence "in the light most favorable" to Kolstad, giving her "the benefit of every fair and reasonable inference," *Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 471 (D.C. Cir. 1987). Viewed this way, the jury could have based its finding of liability—again, a finding of intentional discrimination affirmed unanimously by the panel—on much more than "rejection, as mere pretext, of ADA's proffered rationales," Maj. Op. at 20.

To begin with, the record contains evidence from which the jury could have concluded that Kolstad was the more qualified of the two candidates. A lawyer, Kolstad worked for six years as the principal legislative draftsperson for the Department of Defense, preparing testimony for congressional hearings and representing the Department's interests on Capitol Hill. Employed for four years at ADA when the position opened, Kolstad served as Director of Federal Agency Relations, handling the entire range of regulatory issues of con-

cern to ADA. She consistently received "distinguished" performance evaluations from the Director of ADA's Washington office. By contrast, Tom Spangler, the male candidate who got the promotion, began working for ADA only a year and a half before the position opened, technically failed to meet the minimum posted requirements for the position, and received negative comments about his writing ability, a skill ADA highlighted at trial as central to the position.

Although the court describes what it perceives to have been a benign, routine selection process, the record contains evidence from which the jury could have concluded that because ADA preselected Spangler for the position, the selection process was a sham. Before ADA posted the opening, Spangler met frequently with the incumbent (Jack O'Donnell), ADA did not post the position promptly after O'Donnell decided to retire, and a secretary familiar with the process testified that she thought Spangler was being groomed for the job. Leonard Wheat, head of ADA's Washington office and the person most closely supervising the competing candidates, refused to meet with Kolstad to discuss O'Donnell's position, despite frequently meeting with Spangler. Although Executive Director Dr. William Allen formally appointed O'Donnell's successor, Allen—based in ADA's Chicago headquarters—relied heavily upon Wheat's recommendation of Spangler. Assigning all legislative work to Spangler, Wheat repeatedly refused Kolstad's requests to work on legislative matters, despite their relevance to the regulatory issues she covered and her experience in the field. Formally interviewing Spangler but not Kolstad, Allen failed to review Kolstad's numerous, detailed, positive performance evaluations.

The record also contains evidence, equally minimized by the court, from which the jury could have concluded that ADA attempted to cover up Spangler's preselection. Compiling a description of O'Donnell's position a few days before posting the job, Allen edited the description to fit Spangler's qualifications. O'Donnell's position description originally stated that its "most important responsibility" was to "[m]aintain liaison with federal agencies, bureaus and Administration," corresponding directly to Kolstad's work at ADA. Tailoring the job description to Spangler's specialty, Allen added "Congress" before "federal agencies," and also added whole phrases from the position description questionnaire used to hire Spangler. As Kolstad argued, the jury could have believed that ADA, in an effort to bolster its claim that Spangler was more qualified, altered documents to justify his promotion.

Kolstad proffered a 1984 consent decree settling a class action suit brought against ADA by female employees under Title VII and the Equal Pay Act. *Resnick v. American Dental Ass'n*, No. 79–C–3785 (N.D. Ill.). Denying wrongdoing and expiring prior to the decision not to promote Kolstad, the decree showed that ADA had specific knowledge of the impropriety of preselection, as well as of the connection between preselection and employment discrimination. The decree stated that "pre-selection of a favored candidate is contrary to ADA's firm policy of giving full and fair consideration to each application. Violations of this policy will have an adverse impact on an employee's annual merit review and will be cause for discipline." The district court refused to admit the decree to prove liability, but the panel stated in a portion of the opinion not before us that the district court could admit the decree in a trial on punitive damages. *See Kolstad v. American Dental Ass'n*, 108 F.3d 1431, 1439 (D.C. Cir. 1997).

From the evidence, the jury also could have found that ADA changed its explanation for rejecting Kolstad. After telling her that she was passed over because she lacked experience with health care reform and was too valuable in her position, ADA abandoned that justification at trial, instead attacking Kolstad's general qualifications and writing ability. My colleagues ignore this testimony, but the jury was entitled to consider it as evidence of ADA's falsehood, and therefore of its discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (*particularly if disbelief is accompanied by a suspicion of mendacity*) may, together with the elements of the prima facie case, suffice to show intentional discrimination.") (emphasis added).

The record also contains evidence from which the jury could have concluded that Wheat, Kolstad's supervisor whose advice Allen relied on in deciding to promote Spangler instead of Kolstad, told sexually offensive jokes at the office and referred to professional women as "bitches" and "battleaxes." Although this testimony may have been "contested" (the panel's word) or even "hotly contested," (the court's words), nothing in the record indicates that the testimony lacked sufficient credibility for the jury to believe it.

In addition to weighing the evidence instead of viewing it from a reasonable juror's perspective, my colleagues isolate each element of Kolstad's case, diminishing the cumulative significance of her proof. Of course, preselection "by itself," Maj. Op. at 21, violates no law, and "sexist remarks ... are 'not always conclusive of sex discrimination,'" *id.* at 22 (quoting *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1513 (D.C. Cir. 1995)). As in even the most compelling cases of discrimination, any aspect of Kolstad's case taken in isolation might seem minimal. Considering her evidence together, as this court must, *see, e.g., Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1140 (7th Cir. 1994), and reviewing it "in the light most favorable" to Kolstad, giving her "the benefit of every fair and reasonable inference," *Anderson*, 820 F.2d at 471, the jury could have concluded that this record contains substantial circumstantial, perhaps even direct, evidence of invidious, intentional, unlawful discrimination that society no longer tolerates. Therefore, even if punitive damages are "improbable" in a case where the verdict rests on no more than the jury's rejection of the employer's nondiscriminatory rationale, this is not that case.

IV

Because this court has found that the record contains sufficient evidence to support the jury's finding of intentional discrimination on the basis of sex, and because ADA never attempted to justify its use of sex in the promotion decision,

never disavowed the actions of its agents (Wheat and Allen), never offered evidence that it had taken any specific steps to comply with Title VII, and never otherwise demonstrated that in intentionally discriminating against Kolstad, it had not acted with reckless indifference to her federally protected rights, I would remand for a trial on punitive damages.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 1996 Decided March 21, 1997

No. 96–7030

CAROLE KOLSTAD,
APPELLANT/CROSS-APPELLEE

v.

AMERICAN DENTAL ASSOCIATION,
APPELLEE/CROSS-APPELLANT

Consolidated with
96–7047

Appeals from the United States District Court
for the District of Columbia
(No. 94cv01578)

Joseph A. Yablonski argued the cause and filed the briefs for appellant/cross-appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Bruce S. Harrison argued the cause for appellee/cross-appellant. With him on the briefs was *Elizabeth Torphy-Donzella.*

Before: WALD, WILLIAMS and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WILLIAMS.

TATEL, *Circuit Judge*: A jury awarded Carole Kolstad back pay after finding that her employer had violated her rights under Title VII of the 1964 Civil Rights Act by denying her a promotion because she is a woman. The district court entered judgment against the employer in the amount of the jury award, but denied Kolstad further relief. Because the jury could reasonably find from the evidence that Kolstad's employer intentionally discriminated against her on the basis of sex, we hold that the district court properly denied the employer's motion for judgment as a matter of law, but that it erred in refusing to instruct the jury on punitive damages. We thus remand the case for trial on Kolstad's punitive damages claim and for reconsideration of her claims for further equitable relief and attorney's fees.

I

A Chicago-based professional association, appellee and cross-appellant, the American Dental Association (ADA), maintains an office in Washington, D.C. to represent its members' interests before Congress and various federal agencies. In September 1992, Jack O'Donnell, the second-highest ranking employee in ADA's Washington office, announced his retirement at year's end. O'Donnell held the dual-titled position of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. His responsibilities included developing and communicating ADA's positions on federal legislation and regulations affecting its membership, and managing tri-annual meetings of the Council on Governmental Affairs, a policy-making body composed of ADA members.

Upon learning of O'Donnell's retirement, appellant Carole Kolstad, then serving as ADA's Director of Federal Agency Relations, and Tom Spangler, then ADA's Legislative Counsel, each expressed interest in O'Donnell's job. A lawyer, Kolstad had handled federal regulatory issues at ADA for four years, consistently receiving "distinguished" performance evaluations from the Director of ADA's Washington office, a position held in 1992 by Leonard Wheat. Earlier in her career, Kolstad had spent six years in the General Counsel's office of the Department of Defense, where she drafted proposed legislation, prepared testimony for Congressional hearings, and represented the Department's interests on Capitol Hill. Also a lawyer, Spangler had worked at ADA for twenty months, focusing on legislative issues facing the organization. He too had received "distinguished" performance evaluations from Wheat. Prior to joining ADA, Spangler had spent five years lobbying Congress on behalf of the National Treasury Employees Union. Kolstad and Spangler each had experience working with O'Donnell, with Spangler principally supporting his lobbying efforts and Kolstad, his management of the Council.

Although Wheat had the authority to name O'Donnell's replacement, he asked Dr. William Allen, ADA's Executive Director in Chicago, to make the appointment. After consulting with Wheat, Allen drafted a revised "Position Description Questionnaire" for O'Donnell's job that incorporated verbatim many of the job responsibilities recorded on the Position Description Questionnaire that had been used to hire Spangler for the Legislative Counsel position in 1991. In October 1992, three months before O'Donnell's retirement, Wheat signed a performance evaluation of Spangler that listed as one of Spangler's 1993 goals to "provide management and administrative support ... for the Council on Government Affairs," work that O'Donnell was then performing.

Spangler formally applied for O'Donnell's position once posted in mid-November 1992. After writing Allen that Wheat had refused for several weeks to meet with her to discuss her interest in the position, Kolstad also applied. Following interviews with both Spangler and Kolstad, Wheat

recommended Spangler for the job. Allen then offered Spangler the promotion, which he accepted. Informing Kolstad of the decision, Allen explained that she lacked experience with health care reform and was too valuable to ADA in her current position to take on O'Donnell's job.

After exhausting her administrative remedies before the Equal Employment Opportunity Commission, Kolstad filed suit, charging ADA with unlawful employment discrimination and seeking equitable relief, 42 U.S.C. § 2000e–5(g)(1), and damages, 42 U.S.C. § 1981a (1994). In her complaint, Kolstad demanded a jury trial on all claims. Prior to opening arguments at trial, Kolstad informed the district court that the parties had agreed to try her claims for equitable relief to the court, with the jury rendering an advisory verdict on back pay pursuant to Federal Rule of Civil Procedure 39(c). The court agreed to try to the bench Kolstad's claim for the equitable remedy of instatement, but declined to rule on whether the jury would render an advisory verdict on the back pay claim. Kolstad proceeded to try her case to the jury, introducing evidence to support an award of back pay. At the close of evidence, the district court denied ADA's motion for judgment as a matter of law, but dismissed Kolstad's claims for compensatory and punitive damages, finding insufficient evidence to support them. With respect to back pay, the court stated, "I am going to put it to the jury and we can leave until after the fact whether it's advisory or binding."

Answering two special interrogatories, one on liability and the other on "damages," the jury found that ADA had unlawfully discriminated against Kolstad on the basis of sex, awarding her $52,718, precisely the amount she sought as back pay. Kolstad then moved for instatement into the position occupied by Spangler and for attorney's fees. ADA renewed its motion for judgment as a matter of law. In a memorandum opinion, the district court denied both motions. *Kolstad v. American Dental Ass'n*, 912 F. Supp. 13 (D.D.C. 1996). After concluding that the jury could properly find unlawful discrimination from the evidence, and that the jury's award of

back pay was "conclusive" under Rule 39(c), the court held that Kolstad was not entitled to further equitable relief or attorney's fees because she had failed to prove "to the Court's satisfaction" that she was a victim of sex discrimination. *Id.* at 14 n.1, 15–16. The court entered judgment against ADA in the amount of the jury award.

On appeal, Kolstad challenges the district court's refusal to allow the jury to consider an award of punitive damages, as well as the court's denial of her claims for instatement into the Director's job and attorney's fees. ADA cross-appeals the court's denial of its motion for judgment as a matter of law and the court's ruling that the jury's verdict was binding.

II

We begin with ADA's challenge to the district court's denial of its motion for judgment as a matter of law. Reviewing the district court's ruling *de novo*, we ask whether the evidence was sufficient for a reasonable jury to have reached the challenged verdict. *Mackey v. United States*, 8 F.3d 826, 829 (D.C. Cir. 1993).

Title VII of the 1964 Civil Rights Act provides that:

> It shall be an unlawful employment practice for an employer—
>
> (*l*) to fail or refuse to hire ... or otherwise to discriminate against any individual with respect to ... compensation, terms, conditions, or privileges of employment, because of such individual's ... sex....

42 U.S.C. § 2000e–2(a). In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court set forth the basic allocation of burdens and order of proof in Title VII cases alleging discriminatory treatment, as the complaint does in this case. The plaintiff bears the initial burden of proving a prima facie case of discrimination. *Id.* at 802. Where sex discrimination in promotion is alleged, a plaintiff proves her prima facie case by showing that she is female, that she was refused a position for which she applied and was qualified, and that the employer filled the position with a

male. *See Valentino v. United States Postal Serv.*, 674 F.2d 56, 63 (D.C. Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981). If established, the prima facie case raises an inference of discrimination that the employer may rebut with evidence of legitimate, nondiscriminatory reasons for the plaintiff's rejection. *McDonnell Douglas*, 411 U.S. at 802. The plaintiff then bears the ultimate burden of persuading the jury of intentional discrimination, which she may satisfy by proving that the defendant's proffered reasons were pretexts for unlawful discrimination. *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 805, *cert. dismissed*, 116 S. Ct. 1037 (1996); *see McDonnell Douglas*, 411 U.S. at 802–805.

As in the district court, ADA concedes that Kolstad "met the paper qualifications for the vacancy," Appellee/Cross-Appellant's Br. at 37, and that the jury could have reasonably found that, despite her qualifications, "Kolstad never was in the running" for the Director's job because Executive Director Allen had decided, before the vacancy was posted, that Spangler was the best candidate to replace O'Donnell. Appellee/Cross-Appellant's Reply Br. at 10. ADA argues, however, that even assuming Spangler's preselection for the position, no reasonable jury could have concluded that Kolstad was a victim of sex discrimination because the evidence overwhelmingly demonstrates legitimate nondiscriminatory reasons for Kolstad's rejection. We disagree.

An employer's preselection of a job candidate, in violation of its own procedures requiring fair consideration of qualified applicants, is "undeniably relevant to the question of discriminatory intent," *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), and "operates to discredit the employer's proffered explanation for its employment decision," *Goostree v. State of Tenn.*, 796 F.2d 854, 861 (6th Cir. 1986); *see also Krodel*, 748 F.2d at 709 (improper selection procedures relevant to determination that employer's nondiscriminatory explanation unworthy of belief). Here, evidence that Allen "cut-and-paste" Spangler's job responsibilities into the Position Description Questionnaire for O'Donnell's position, that Office Director

Wheat agreed that Spangler's goals for 1993 included performing portions of O'Donnell's job, and that Spangler began meeting extensively with O'Donnell as soon as his retirement was announced permitted the jury to conclude that ADA had selected Spangler to succeed O'Donnell before the posting of the position in November 1992. From evidence that Allen did not review Kolstad's performance evaluations or resume, failed to interview Kolstad for the position, and gave Kolstad a different explanation for her rejection than the one subsequently offered by ADA, the jury could also have reasonably found that ADA's claimed nondiscriminatory reasons for choosing Spangler over Kolstad—that Kolstad lacked recent legislative experience and strong writing skills—were after-the-fact rationalizations unworthy of belief.

We have held that a jury's "rejection of the employer's nondiscriminatory reasons, while not sufficient to *compel* a finding of discrimination, nonetheless suffices to *permit* such a finding." *Barbour*, 48 F.3d at 1277; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). As the Supreme Court has observed, "'no additional proof of discrimination is required.'" *Hicks*, 509 U.S. at 510 (quoting *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 493 (8th Cir. 1992)). Thus, "a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant's proffered nondiscriminatory reasons; at that point, the fact finder, if so persuaded, may infer discrimination." *Barbour*, 48 F.3d at 1277. Because Kolstad introduced sufficient evidence for the jury to conclude both that she had proven a prima facie case of discrimination and that ADA's proffered reasons were pretextual, the jury could have reasonably concluded that Kolstad proved intentional sex discrimination.

As in *Barbour*, while we need not speculate about the jury's reasoning, it could have inferred that Kolstad's sex—and not her qualifications—motivated ADA's actions. That inference could reasonably flow from Kolstad's prima facie case and the evidence of Spangler's preselection, as well as from Kolstad's testimony, contested but not incredible, that Wheat ignored her efforts to discuss the promotion, denied her other career-

enhancing opportunities, told sexually offensive jokes at staff meetings, and referred to several professional women as "bitches" or "battleaxes." Although Wheat did not formally appoint O'Donnell's successor, he had the authority to do so, recommending to Allen that Spangler and not Kolstad get the job. Consistent with our cases and the evidence at trial, the district court properly denied ADA's motion for judgment as a matter of law.

III

Having decided that the jury could reasonably find that ADA intentionally discriminated against Kolstad, we next address Kolstad's challenge to the district court's dismissal of her claim for punitive damages.

Finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace," 42 U.S.C. § 1981 (note) (1994) (Congressional Findings), Congress enacted the Civil Rights Act of 1991, significantly expanding the monetary relief potentially available to victims of unlawful discrimination. *See* 42 U.S.C. § 1981a; *Landgraf v. USI Film Products*, 511 U.S. 244, 252–55 (1994). The Act provides that a plaintiff who proves intentional discrimination in violation of Title VII may recover compensatory and punitive damages in addition to equitable relief available under prior law. 42 U.S.C. § 1981a(a). Punitive damages may be awarded "if the [plaintiff] demonstrates that the [defendant] engaged in a discriminatory practice ... with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The Act caps punitive damages, along with compensatory awards, at between $50,000 and $300,000, depending on the employer's size. 42 U.S.C. § 1981a(b)(3).

Relying on an excerpt from the Act's legislative history, ADA argues that Congress intended Title VII plaintiffs to recover punitive damages only in "extraordinarily egregious cases," suggesting that the quantum of proof necessary to sustain such an award is greater than courts have traditional-

ly required. *See* 137 Cong. Rec. S 15473 (Oct. 30, 1991) (Interp. Mem. of Sen. Dole *et al.*). In response, Kolstad points to legislative history expressly contradicting this assertion: "Punitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981." *See* 137 Cong. Rec. H 9527 (Nov. 7, 1991) (Interp. Mem. of Rep. Edwards). Decisive to us, however, is section 1981a's plain language, which tracks the standard that courts had previously established for the proof required to sustain awards of punitive damages under other federal civil rights statutes. *See Smith v. Wade*, 461 U.S. 30, 56 (1983) (plaintiff must prove "evil motive or intent, or ... reckless or callous indifference to the federally protected rights of others" for punitive award under § 1983); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (applying same standard under § 1981). That standard, in turn, is rooted in the common law. *See, e.g.*, Restatement (Second) of Torts § 908(2) (1979) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."); *see also Wade*, 461 U.S. at 38–49. We think that if Congress had meant the courts to depart from well-established legal standards, it would have made that intention clear in the language of the Act. Because it did not do so, instead choosing language already laden with meaning, and because we find no authoritative legislative history to suggest otherwise, we hold that the standard of proof required to sustain awards of punitive damages under 42 U.S.C. § 1981a is the same as that previously established for punitive awards under 42 U.S.C. §§ 1981 and 1983.

As both the Supreme Court and this court have explained, "evidence that suffices to establish an *intentional* violation of protected civil rights also may suffice to permit the jury to award punitive damages, provided that the jury, in its 'discretionary moral judgment,' finds that the conduct merits a punitive award." *Barbour*, 48 F.3d at 1277 (emphasis added) (citations omitted) (quoting *Wade*, 461 U.S. at 52). In such cases, "[n]o additional evidence is required," *id.*, because "the

state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable." *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987). Having concluded that the jury could reasonably find from the evidence that ADA intentionally discriminated against Kolstad, the district court should have instructed the jury that upon the requisite finding—malice or reckless indifference to Kolstad's rights—it could consider a punitive award. The evidentiary threshold having been reached, discretion to award punitive damages, within the limits set by statute, lay with a properly instructed jury, not the court.

Citing legislative history from the unadopted House version of the 1991 Act and case law from other jurisdictions, our dissenting colleague argues that "something substantially more blameworthy" than "garden-variety" intentional race or sex discrimination should be required before a jury may consider a punitive award under § 1981a. Dissent at 1, 11. We note that the House Report on which the dissent relies states clearly that the new law "sets the same standard courts have applied under § 1981," H.R. Rep. No. 40(I), 102d Cong., 1st Sess. at 74, and cites the First Circuit's decision in *Rowlett v. Anheuser-Busch*, as well as *Smith v. Wade*, cases which support, in our view, this court's § 1981 jurisprudence. Consistent with our holding in *Barbour* and the Supreme Court's reasoning that "society has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others," *Wade*, 461 U.S. at 54–55, we can conceive of no principled basis for second-guessing the jury's "discretionary moral judgement," *id.*, about which acts of intentional discrimination are sufficiently "outrageous" or "egregious" to merit punitive awards. Nor, as the dissent admits, do the cases from our sister circuits supply one, much less the smattering of state court cases which the dissent implies have worked some change in the common law since *Wade*. If, as the dissent suggests, something is missing from Kolstad's case *as a matter of law*, what is it? Or, as the First Circuit put the question in a different context, "can it really be disputed that intentionally discriminating against a black man

on the basis of his skin color is worthy of some outrage?" *Rowlett*, 832 F.2d at 206. Absent persuasive answers to these questions or further guidance from Congress, we leave the decision to award punitive damages for intentional civil rights violations to the jury.

By our decision today, we do not suggest that evidence sufficient to establish liability under Title VII for intentional discrimination will always sustain an award of punitive damages under section 1981a. Not every employment practice violating Title VII is "obviously the kind of conduct that society normally will not tolerate." *Hernandez-Tirado v. Artau*, 874 F.2d 866, 869 (1st Cir. 1989) (setting aside punitive damages in § 1983 case of politically motivated demotion of public official). Rather, it may be "conduct that sometimes is lawful and sometimes is not, depending on a complex set of legal rules ... that a particular [employer] might, or might not, actually understand." *Id.* at 869–70. Thus, where an employer does not deny discrimination but defends on the ground that the discrimination is not unlawful, evidence sufficient to support a finding of liability might not also support a finding of malice or reckless disregard of federally protected rights. For example, evidence that an employer erroneously used religion, sex, or national origin as a "bona fide occupational qualification" for employment, *see* 42 U.S.C. § 2000e–2(e), may be insufficient to support an award of punitive damages. Evidence that an employer overreached in its efforts lawfully to remedy the effects of past discrimination likewise might be insufficient to establish that the employer acted maliciously or recklessly. In such cases, although the challenged employment practice amounts to "intentional" discrimination, it may only be "negligent [as] to the existence of a federally protected right," *Hernandez-Tirado*, 874 F.2d at 870. We also think that where intentional discrimination occurs outside the scope of the agency relationship between employer and employee—in a hostile work environment case, for example—evidence sufficient to support employer liability may not establish that the employer maliciously or recklessly permitted the offending conduct. *See, e.g., Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809–10 (5th Cir. 1996);

see generally Gary v. Long, 59 F.3d 1391 (D.C. Cir. 1995) (discussing application of agency law to hostile work environment claims). In each of these kinds of cases, the district court may need to assess separately whether evidence sufficient to support a finding of intentional discrimination also suffices to instruct the jury on punitive damages.

This case does not present these or analogous circumstances. ADA neither attempted to justify the use of sex in its promotion decision nor disavowed the actions of its agents. Rather, it flatly denied Kolstad's allegation of invidious sex discrimination, discrimination lying at the heart of Title VII that society no longer tolerates. Having produced evidence sufficient to prove her charge, Kolstad was entitled to have the jury consider whether ADA's conduct warranted a punitive award. We thus remand the case to the district court for trial on Kolstad's punitive damages claim.

This brings us to Kolstad's argument that, in a trial of her claim for punitive damages, she should be permitted to introduce in evidence a consent decree settling a prior discrimination suit brought against ADA in which the association, although admitting no liability, conceded that "preselection of a favored candidate" is contrary to its personnel policies. The district court ruled the consent decree inadmissible at trial, finding its probative value as evidence of ADA's preselection of Spangler substantially outweighed by its possibly prejudicial effect on the jury. *See* Fed. R. Evid. 403. Although finding no abuse of discretion in the district court's ruling, *see Joy v. Bell Helicopter Textron, Inc*, 999 F.2d 549, 554 (D.C. Cir. 1993) (Rule 403 determination reversed only for abuse of discretion), we note the court's suggestion that it would reconsider the decree's admissibility to impeach the testimony of ADA's witnesses. Because Kolstad did not offer the document for impeachment purposes, we express no opinion on whether, or in what circumstances, the consent decree might now be admissible as evidence to support Kolstad's claim for punitive damages. *See Johnson v. WMATA*, 883 F.2d 125, 130 (D.C. Cir. 1989) (in Rule 403 balancing, court must consider probative value in light of other evidence at trial).

IV.

We turn finally to the parties' respective challenges to the district court's treatment of the jury's verdict. ADA argues that the district court erred by ruling that the jury's verdict was binding on the court. Because the parties had agreed that the jury would sit only in an advisory capacity with respect to back pay, and because back pay was the only claim for relief to reach the jury, ADA contends that the jury's verdict was advisory in its entirety, and that we should remand the case to the district court for findings of fact and conclusions of law under Federal Rule of Civil Procedure 52. Kolstad disagrees, arguing that because she was entitled to a jury trial on her claims for compensatory and punitive damages, *see* 42 U.S.C. § 1981a(c), the district court was bound to accept the jury's verdict notwithstanding the dismissal of those claims. She thus contends that the district court erred in rejecting her claims for further equitable relief and attorney's fees based on the court's independent view of the evidence. Although we agree that the district court erred in its treatment of the jury's verdict, we conclude that the proper disposition of this case lies in between the parties' competing positions.

To begin with, we agree with Kolstad that the jury's determination of liability must remain undisturbed. But for the court's error in dismissing Kolstad's punitive damages claim, the jury's verdict would have been conclusive, as a claim for punitive damages capable of withstanding summary judgment entitled Kolstad to a jury trial. Furthermore, when the district court expressed its view that the evidence was insufficient to support an award of either compensatory or punitive damages, ADA neither moved to dismiss the jury nor expressly argued, as it does now, that the jury's determination of liability could therefore only be advisory. Rather, ADA's counsel suggested that "the issue for the jury, if the court were to have the jury provide an advisory verdict *on damages*, would be whether Ms. Kolstad is entitled to back pay...." As a result, the district court framed this question, "[A]re you agreed that if I allow the jury to deliberate *on damages*, it is an advisory verdict *to the extent that it represents back pay?*" Although the record is not entirely clear on this point, it seems to us that both the parties and the court were operating on the assumption that the jury would conclusively decide the question of liability, regardless of whether the jury's determination of the back pay award was only advisory.

As to the question of back pay, we agree with ADA that the district court was not bound by the jury's verdict. Before voir dire, Kolstad represented to the district court that the parties had agreed "to the jury resolving questions in an advisory capacity with respect to the equitable relief," including back pay, under Rule 39(c). Although that rule gives the district court discretion to try equitable claims with an advisory jury, Rule 52(a) requires in such cases that the court enter its own findings of fact and conclusions of law. Fed. R. Civ. P. 39(c), 52(a). Because the record does not reflect that ADA consented to a binding jury determination of Kolstad's back pay award, the jury's verdict was advisory on that score. On remand, the district court must therefore make its own findings as to the amount of back pay, if any, Kolstad should receive.

Finally, the district court must also reconsider Kolstad's claims for further equitable relief and attorney's fees. Consistent with the Seventh Amendment's command that "no fact tried by a jury[ ] shall be otherwise re-examined in any Court of the United States," U.S. Const. amend. VII, "when a case contains claims triable to a jury and claims triable to the court that involve common issues of fact, the jury's resolution of those issues governs the entire case." *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 803 (D.C. Cir. 1984); *see generally Dairy Queen v. Wood*, 369 U.S. 469 (1962). As our sister circuits have uniformly held in cases involving allegations of intentional discrimination, the district court must therefore follow the jury's factual findings with respect to a plaintiff's legal claims when later ruling on claims for equitable relief. *See, e.g., Sorlucco v. New York City Police Dept.*, 971 F.2d 864, 873–74 (2d Cir. 1992); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (citing additional cases). Contrary to this principle, the district court here

denied Kolstad's claim for instatement, as well as her petition for attorney's fees, on the ground that she had not proven her claim of intentional sex discrimination "to the Court's satisfaction." Because we agree with the district court that the jury's finding of intentional discrimination must be upheld, Kolstad is entitled to have her claims for equitable relief and attorney's fees properly considered by the court in light of the jury's verdict.

Affirming the district court's denial of ADA's motion for judgment as a matter of law, we remand the case to the district court for trial on punitive damages and for reconsideration of Kolstad's claims for equitable relief and attorney's fees.

So ordered.

WILLIAMS, *Circuit Judge*, concurring in part and dissenting in part. I concur in much of the decision, but not in the conclusion that in a Title VII suit the minimum standard of evidence for punitive damages is, with narrow exceptions, no higher than the standard for liability. See Maj. Op. at 8–12.

The 1991 Civil Rights Act authorizes punitive damage awards in Title VII cases where the defendant engaged in the discriminatory act "with malice or with reckless indifference to the [plaintiff's] federally protected rights." 42 U.S.C. § 1981a(b)(1) (1994). The majority concludes that in the ordinary claim of sex discrimination, which must be intentional to be actionable (except for "disparate impact" liability, for which the statute expressly precludes punitive damages), the jury is automatically empowered to find malice or reckless indifference. Maj. Op. at 9–10. The ruling may seem to manifest impeccable logic, as an intent to discriminate seems to encompass "reckless indifference" to the rights of the discrimination victim. But the upshot of the majority's view is that punitive damages are available in every case of garden-variety Title VII discrimination, excepting only a few rather unusual ones such as claims dependent on an employer's miscalculation of the bona fide occupational qualification exception. See Maj. Op. at 11–12. But if this were Congress's intent, why would there be a separate provision purporting to describe a special standard for punitive damages?

Every circuit to address the question thus far has read § 1981a to demand proof of a more culpable state of mind for punitive damages than the ordinary intent necessary for a violation of Title VII. *Emmel v. Coca-Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996) (characterizing standard for punitive damages as a "higher hurdle" than that for proving the underlying discrimination); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (despite sufficiency of evidence for liability and "duplicitous" actions of defendant's employees, evidence insufficient for punitive damages); *Karcher v. Emerson Electric Co.*, 94 F.3d 502, 509 (8th Cir.

1996) (although jury could properly infer intentional sex discrimination from inconsistent nature of hiring process and failure to select and train women, it could not find malice or deliberate indifference); *Pandazides v. Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (stating in dictum that "[w]hile 'intentional discrimination' suffices to recover compensatory damages, Congress requires a heightened showing of discriminatory action ... to recover punitive damages"); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 507–09 (1st Cir. 1996) (endorsing concept of a higher standard for punitive damages; rejecting district court's denial of punitive damages solely on basis of cultural factors, but acknowledging that cultural factors would "likely have an impact on [a defendant's] consciousness of wrongdoing"). None of these opinions, to be sure, offers much by way of explanation, although *McKinnon* points to a comparatively useful piece of legislative history, the House Report on language almost identical to that of the final bill:

> Plaintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, *and must meet an even higher standard* (establishing that the employer acted with malice or reckless or callous indifference to their rights) *to recover punitive damages.*

Id. at 507, quoting H.R. Rep. No. 40(I), 102d Cong., 1st Sess. at 72 (1991) (emphasis added) ("House Report").[1] To justify creating a split with five sister circuits (particularly in light of this item of legislative history), we ought to have a powerful reason. I don't see it.

* * *

[1] The majority dismisses the House Report as involving "the unadopted House version of the 1991 Act." Maj. Op. at 10. But the only conceivably material difference in wording is that the House bill allowed punitive damages on a *broader* basis than the ultimate legislation, as it permitted them where defendant engaged in discriminatory practices "with malice, or with reckless *or* callous indifference to [plaintiff's] federally protected rights," House Report at 12 (emphasis added), the key difference being addition of the word "callous" in the alternative.

I agree with the majority's general proposition that it is sensible to look to standards rooted in the common law to understand what Congress meant when using the phrase "malice or reckless indifference." But in what seems to me the relevant context, namely decisions relating to intentional torts and of roughly the vintage of the 1991 Act, the common law appears to require a state of mind more extreme than what is required for the intentional tort on which the punitive claim is piggybacked.

In *Smith v. Wade*, 461 U.S. 30 (1983), the Court addressed the right of plaintiffs to punitive damages in cases arising under 42 U.S.C. § 1983. The claim was that the defendant prison guard had failed to protect the plaintiff inmate from harassment, beatings and sexual assault by fellow inmates. The plaintiff had proved gross negligence on the part of the guard, and thus a violation of plaintiff's Eighth Amendment right. *Id.* at 33. As § 1983 made no reference to punitive damages, the Court looked to the common law for the appropriate standard. It rejected the proposition that "actual malicious intent—'ill will, spite, or intent to injure'," *id.* at 37, was required for punitive damages, and held instead that they were allowable when the defendant's conduct was "motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others." *Id.* at 56. The Court reasoned that "the rule in a large majority of [states] was that punitive damages ... could be awarded without a showing of actual ill will, spite, or intent to injure." *Id.* at 41. A dissent by Justice Rehnquist, joined by Chief Justice Burger and Justice Powell, read the historic record differently, arguing that "at least some degree of bad faith or improper motive" was required. *Id.* at 56. Justice O'Connor also dissented. Finding that the historical record provided no real guidance on the intent of Congress at the time of enactment in 1871, she reasoned that the majority's standard was inconsistent with the purposes of § 1983.

Obviously it is not our place to replay this argument. I make only a narrower point. In the area of intentional torts, the common law analog of intentional discrimination, courts generally require an especially egregious intent, even when

they are applying punitive damage standards *phrased* the same as the one set forth in *Smith v. Wade* and echoed in § 1981a(b)(1). In doing so, they apply the general principle that "[s]omething more than the mere commission of a tort is always required for punitive damages." W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 2, at 9 (5th ed. 1984); see also *id.* at 11 ("it is not so much the particular tort committed as the defendant's motives and conduct in committing it"). To be sure, the *Smith v. Wade* majority's reading of the "rules of ordinary tort law" in substance rejected Prosser & Keeton's. 461 U.S. at 53. But in the realm of intentional torts such a rejection has little support.

The Restatement (Second) of Torts, Section 908, for instance, asserts a generality similar to the wording of *Smith v. Wade* and of § 1981a, saying that punitive damages are allowable "for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." One might expect that under this formula plaintiffs asserting any intentional tort could automatically get to the jury on punitive damages. But the comments to the Restatement draw such a claim in question. Comment b says that damages are only appropriate where there is "some element of outrage similar to that usually found in crime." See also comment d (although award of punitive damages left to jury discretion, "[i]t is error ... to award punitive damages if there has been no bad motive or wanton indifference").

Some state courts have explicitly interpreted the Restatement to require some evidence of bad motive in the intentional tort context. The Missouri Supreme Court in *Burnett v. Griffith*, 769 S.W.2d 780 (1989) (en banc), said that it "is not so much the commission of the intentional tort as the conduct or motives—the defendant's state of mind—which prompted its commission that form the basis for a punitive damage award." *Id.* at 787. "Plaintiff must prove that defendant's evil hand was guided by an evil mind." *Id.* The court *rejected* a jury instruction stating that malice "does not mean hatred, spite or ill will, as commonly understood, but means the doing of a wrongful act intentionally without just cause or excuse," *id.* at 788, explaining that the language failed to

explain to jurors that "a bad motive or reckless disregard for the rights of others is required." *Id.* at 789; see also *Ryburn v. General Heating & Cooling, Co.*, 887 S.W.2d 604, 609 (Mo. App. 1994) (interpreting *Burnett* as focusing "on the matter of moral culpability so that the jury would not impose punitive sanction on a defendant for the mere commission of an intentional tort").

Similarly, the D.C. Court of Appeals has construed language at least as loose as that of § 1981a ("fraud, ill will, recklessness, wantonness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury") to require, for the tort of intentional interference with contract, something more than the intent necessary for the tort itself. *Dyer v. William S. Bergman & Assocs.*, 657 A.2d 1132, 1139 n.10 (D.C. 1995). Given the "overlap" between the state of mind needed for punitive damages and that needed for tortious interference with contract, the court said:

> [T]rial judges must be alert to the need to frame their instructions to the jury in a way that makes it clear that proof of intentional interference [with contract] does not automatically entitle the plaintiff to an award of punitive damages.
>
> Arguably, where the tort alleged is an intentional one, inherently containing elements of willfulness, an award of punitive damages must rest upon that tort being committed in an outrageous way; in other words, the "outrageousness" cannot be supplied by the conduct required to commit the tort itself.

Id. And Alaska, which at least nominally allows punitive damages for "reckless indifference" to others' interests, *Alyeska Pipeline Service Co. v. O'Kelley*, 645 P.2d 767 (Ak. 1982), in fact denies them where an intentional tort is not accompanied by evidence supporting an inference of "actual malice or conduct sufficiently outrageous to be deemed equivalent to actual malice". *Id.* at 774.

Similarly, Vermont courts have used "reckless" language, but seem to require bad motive on top of the intentional tort.

Vermont limits "exemplary" or punitive damages to cases of "malice, ill will, or wanton conduct," but includes within those terms action that is "*reckless* with regard to the plaintiff's rights." *Bruntaeger v. Zeller*, 515 A.2d 123, 127 (Vt. 1986) (emphasis added). Yet, when applying the same formulation in *State Agency of Natural Resources v. Riendeau*, 603 A.2d 360 (Vt. 1991), it held that under a statute imposing ordinary liability for "willful" violations, punitive damages could be awarded only for "bad spirit and wrong intention," and that therefore plaintiff must show "some ... bad motive [that makes the] knowing and intentional conduct malicious." *Id.* at 365; cf. *id.* (distinguishing between the meaning of "willful" in civil cases, where it is "a synonym for 'intentional'" and in criminal cases, where it has a "different and darker shade of meaning").

Cases of an insurer's *bad faith* denial of insured's claims pose a related issue. The tort's label suggests that it requires a more culpable state of mind than mere "intention," but courts in some jurisdictions allow recovery where the insurer has acted in "reckless disregard" of its lack of a reasonable basis for denial. *McCullough v. Golden Rule Insurance Co.*, 789 P.2d 855, 860 (Wyo. 1990); *Anderson v. Continental Insurance Co.*, 271 N.W.2d 368, 376 (Wisc. 1978). In any event, courts appear to have reacted with the same impulse to reserve punitive damages for egregious cases. When the Wyoming Supreme Court embraced the tort, it hastened to refute the suggestion that every such claim would entail a possibility of punitive damages, saying that plaintiff must also show "wanton or willful misconduct," *McCullough*, 789 P.2d at 861, even though Wyoming nominally allows punitive damages for "reckless indifference," *id.* at 860 n.11. The court quoted decisions from other jurisdictions requiring not only intentional breach of the duty of good faith, but "oppression, fraud, or malice." *Id.* at 861.

Wisconsin courts similarly demand an extra notch of evil:

> [T]here is a distinction between the intent or malice necessary to maintain an action for intentional tort (such as bad faith) and the intent which must be shown to recover punitive damages.... [T]here must be a showing of an evil intent deserving of punishment or something in the nature of special ill-will or wanton disregard of duty or gross or outrageous conduct.

Anderson, 271 N.W.2d at 379; see also *Mid-Continent Refrigerator Co. v. Straka*, 178 N.W.2d 28, 32–33 (Wisc. 1970) (noting distinction between "the intent or malice necessary to maintain an action for an intentional tort and that necessary to recover punitive damages" and stating that "something must be shown over and above the mere breach of duty for which compensatory damages can be given").

Some courts, to be sure, take the view that where the elements of an intentional tort entail characteristics justifying punitive damages in other contexts, they are freely available even though the effect is to make punitive damages possible wherever liability is found. See, e.g., *Ellerin v. Fairfax Savings, F.S.B.*, 652 A.2d 1117, 1126 (Md. 1995) ("elements of the tort of [intentional] fraud or deceit in Maryland ... include the type of deliberate wrongdoing and evil motive that has traditionally justified the award of punitive damages"); *Owens v. Parker Drilling Co.*, 676 P.2d 162, 165 (Mont. 1984) ("where a statute is designed to protect the substantial interests of a person from a high degree of risk, and the statute is violated either intentionally or recklessly, a jury question of punitive damages is raised"); *McMullin v. Murphy*, 748 P.2d 171, 173 (Or. Ct. App. 1988) ("evidence sufficient to establish intentional fraud is also necessarily sufficient to support the requisite findings for the imposition of punitive damages, without additional or independent evidence pertaining to the culpability of the defendant's conduct or state of mind").

Perhaps lining up citations on both sides of this question is just another "unilluminating, exegesis of the common law" similar to that in *Smith v. Wade*, which Justice O'Connor there described as yielding only "inexact and contradictory language" unhelpful in interpreting a statute. 461 U.S. at 92–93 (O'Connor, J., dissenting). But that was the Court's approach in *Smith v. Wade*, and in this search for analysis by state common law courts I find the weight of authority

against the idea that just because the governing formula allows punitives for "reckless" behavior it follows that all intentional torts are eligible for punitive damages. In addition, to the extent that there appears to be a split of authority on the question, the split is less close than it appears in view of other measures taken to constrain the award of punitives.

The concern that punitive damages ought not be awarded in every case is reflected in a variety of devices designed to reduce their incidence. See generally Restatement (Second) of Torts, § 908, comment f; see also *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1618 (1996) (Ginsburg, J., dissenting) (appendix summarizing recent state legislative activity designed to reduce the incidence of punitive damages). More than half the states require that evidence supporting punitive damages be "clear and convincing," most of them doing so by statute but several by common law adjudication. See Brian T. Beasley, "North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?" 74 N.C. L. Rev. 2174, 2201 (1996) (appendix providing survey of punitive damage provisions in all 50 states). Although the standard of proof is not at issue in this case, the reasons for adoption of a clear and convincing standard suggest a widespread understanding that the award of punitive damages should not be an everyday event. See, e.g., *Masaki v. General Motors Corporation*, 780 P.2d 566, 574–75 (Haw. 1989) (more exacting standard because punitive damages are stigmatizing punishment of a "quasi-criminal" type); *Linthicum v. Nationwide Life Insurance Co.*, 723 P.2d 675, 681 (Ariz. 1986) (en banc) (applying higher standard because punitive damages are "only to be awarded in the most egregious of cases, where there is reprehensible conduct combined with an evil mind over and above that required for commission of a tort"); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985) (adopting clear and convincing standard because of the risk posed by punitive damages if they can be "loosely assessed").

In light of this common law background, it seems improbable that in adopting § 1981a Congress intended to adopt a

punitive damage standard creating near-universal availability, despite its use of "recklessness" in the statutory formulation.

* * *

As the majority opinion makes clear, the common law is not the only source for interpretation. We can also look to how courts have interpreted a kindred provision, 42 U.S.C. § 1981.[2] Here the circuits are split, with three demanding more than mere intent to discriminate and three not doing so; of the latter, the First and Seventh decline to extend the reasoning to § 1981a.

In *Beauford v. Sisters of Mercy–Province of Detroit*, 816 F.2d 1104 (6th Cir. 1987), the court cited language from *Smith v. Wade* but then stated that punitive damages in civil rights actions have "generally been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant." *Id.* at 1109. Although finding enough evidence of intentional discrimination, the court said there was no evidence of "the requisite malice or reckless or callous indifference of an egregious character," so punitive damages could not be awarded. *Id.* The court in *Stephens v. So. Atlantic Canners, Inc.*, 848 F.2d 484 (4th Cir. 1988), followed *Beauford*, observing that an award of punitive damages "is an extraordinary remedy and is designed to punish and deter particularly egregious conduct." *Id.* at 489. Though the evidence was adequate for plaintiff to get to the jury on intentional discrimination, and though noting that any form of discrimination "constitutes reprehensible and abhor-

[2] Section 1981 prohibits discrimination on the basis of race in the making and enforcement of contracts. In the employment context, it overlaps substantially with Title VII, but the two differ in important respects (e.g., § 1981 applies only to racial discrimination while Title VII covers sex discrimination as well). Until 1991 one of the most important differences was the availability of compensatory and punitive damages under § 1981 but not under Title VII, a difference that made juries available for the former but not the latter. The Civil Rights Act of 1991 brings these two discrimination statutes closer together, but they remain distinct. For example, punitive damage claims under Title VII are capped, while those under § 1981 are not.

rent conduct," *id.*, the court found the evidence inadequate for punitive damages. And in *Walters v. City of Atlanta*, 803 F.2d 1135 (11th Cir. 1986), a § 1983 action based upon racial discrimination, after finding the evidence adequate on liability, the court held that several of the defendants who had denied plaintiff employment had nonetheless not "acted with either the requisite ill will or callous disregard" to justify punitive damages.

In the opposite camp are this circuit, the First and the Seventh. In *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 805, *cert. dismissed*, 116 S. Ct. 1037 (1996) (voluntary settlement by parties), we held that under § 1981 the jury's (sustainable) "finding of intentional racial discrimination permitted it to find" the requisite ill will or reckless or callous indifference for punitive damages. *Id.* at 1277. The First Circuit may have a similar rule. In *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205–07 (1st Cir. 1987), it declined to adopt an aggravation requirement for punitive damages under § 1981, leaving to the trier of fact "discretion to determine whether punitive damages are necessary" where punitive damages are authorized for intentional violations. *Id.* at 205. But in *McKinnon v. Kwong Wah Restaurant* the Circuit quoted and followed the "higher standard" requirement set forth in the House Report, as noted above. See 83 F.3d at 507.

The Seventh Circuit is yet harder to characterize. In *Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986), the court upheld the verdict of intentional discrimination, finding the case basically a "swearing contest," *id.* at 514, and then upheld the award of punitive damages, but only after characterizing it as "a close case," *id.* Unless there was a higher standard for punitive damages, it is hard to see why that case was "close" and the liability issue not. But in *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987), the court appeared to say that punitive damages were available for racial discrimination under § 1981 so long as "the application of the law to the facts at hand was so clear at the time of the act that reasonably competent people would have agreed on its application." *Id.* at 1296.

The position is not unlike that of the panel here, which likewise makes limited allowance for a defendant's mistake on an obscure issue of law. It may be more precise, however, to describe 7th Circuit law as in flux; as noted above, *Emmel v. Coca-Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996), says that an award of punitive damages under § 1981a itself must surmount a "higher hurdle" than mere proof of intentional discrimination.

* * *

With this background in hand, I return to the legislative history of § 1981a. I have already noted the language of the House Report asserting that § 1981a demands of plaintiff "an even higher standard" than simple proof of intentional discrimination. See *supra* p. 2 above. The panel quotes what appear as contradictory glosses on § 1981a urged by a senator and a representative. While Senator Dole said for himself and others that plaintiffs can recover for punitive damages only in "extraordinarily egregious cases," see 137 Cong. Rec. S 15473 (Oct. 30, 1991) (Interp. Memo of Sen. Dole et al.), Representative Edwards said that "[p]unitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981." See 137 Cong. Rec. H 9527 (Nov. 7, 1991) (Interp. Memo of Rep. Edwards). Compare Maj. Op. at 8–9.

It is not clear to me that these views are in conflict. In light of the circuit split, Representative Edwards's comment is indeterminate. For those circuits that have required "egregious" discrimination in the § 1981 context, the two observations fit handily. Of course Representative Edwards's remark may be said to invite us to follow *our* own view of the law derived from § 1981. But that approach seems unduly self-referential. We can reconcile the otherwise disparate items of legislative history (the House Report and the Edwards and Dole statements) by following the courts that have, in applying § 1981, followed the current common law trend that, as to intentional torts, demands for punitive damages something substantially more blameworthy than the intention required for liability. This approach would

also avoid creating a split with all the circuits that have addressed the § 1981a issue.

Because I agree with the panel that the parties agreed to have liability tried to the jury, *id.* at 13–14, I do not dissent from the view that the jury verdict was binding as to liability. But the remand to the district court should not, in my view, include any direction to hold a trial on punitive damages.

APPENDIX C

In the
United States District Court
District of Columbia

Civil A. No. 94-1578 (TPJ)

Carole KOLSTAD, Plaintiff,

v.

AMERICAN DENTAL ASSOCIATION, Defendant.

Jan. 22, 1996

MEMORANDUM AND ORDER

JACKSON, District Judge.

This Title VII employment discrimination case is presently before the Court on defendant's post-trial motion for judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(b), following a jury verdict for plaintiff for $52,718. The plaintiff, in turn, moves for the equitable relief of instatement to the position for which she was rejected by defendant and for an award of her attorney's fees and costs in excess of $175,000. For the reasons to follow both motions will be denied.

I.

In the fall of 1992, defendant American Dental Association ("ADA") selected one Thomas Spangler over plaintiff Carole Kolstad as its new Director of Legislation and Legislative Policy (hereinafter "Director of Legislation") in its Washington, D.C., office, the position being essentially that of chief lobbyist for the ADA before Congress. Both

candidates, then as now employees of the ADA, were deemed eligible insofar as possessing the basic qualifications for the job. The selecting official was Dr. William Allen, the ADA's interim Executive Director in Chicago, who concluded for himself (with, however, the unanimous concurrence of the incumbent Director of Legislation and all other ADA officials in both Washington and Chicago) that Spangler was the better qualified of the two and notified both candidates of his decision in mid-December, 1992.

Kolstad brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. s 2000e *et seq.*, in July, 1994, alleging that, in selecting Spangler as its new Director of Legislation, the ADA had discriminated against her because of her sex. She sought instatement to the position of Director of Legislation and an award of money equal to the aggregate of the difference in the salaries she and Spangler have been paid since January of 1993.

The case was tried October 18-26, 1995, to a jury comprised of six women and two men. The jury was expressly instructed prior to their deliberations that they could award plaintiff relief only upon a finding that she had been a victim of gender discrimination. They were further instructed that the ADA's failure to treat her application fairly in any other respect gave no cause for a finding in her favor. On October 26th the jury answered a special interrogatory finding that Kolstad had been discriminated against on the basis of her sex and awarded her $52,718 in damages representing the pay differential.[1]

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[1] The Civil Rights Act of 1991, 42 U.S.C. s 1981a(c), affords a right to jury trial in Title VII cases for compensatory and punitive damages. Equitable relief, however, remains the province of the Court, including "back pay." *Id.* at (b)(2).

II.

As is often true in Title VII cases, no direct evidence of sex-based motivation on the part of the ADA was presented. Such direct evidence as the jury heard was all to the contrary; specifically, each and every official at the ADA, male and female alike, who had knowledge of the position at stake and the two candidates, and whether or not involved in the selection process, testified that they believed Spangler to be the better qualified, and to have been selected for that reason alone, without regard to sex.

Moreover, the only circumstantial evidence presented favorable to the plaintiff pointed simply to Spangler's "pre-selection," i.e., that Spangler was destined to get the job no matter who else applied. Although ADA witnesses denied it, there is certainly evidence of record from which the jury could have found, as it may well have done, that Spangler had been perceived by the ADA's hierarchy as the heir-apparent to the incumbent Director of Legislation even before the incumbent declared his intention to retire. Kolstad was regarded as both a late entry and an also-ran from the moment she announced her interest in the position. Were pre-selection in itself unlawful, the validity of the jury's verdict would be unquestionable.

What was missing, for present purposes, is evidence even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler. For aught that appears in this record their genders might have been reversed, or they of the same sex. That one was male, and the other female, is a mere fortuity. There is simply no

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Assuming without deciding that the Court might treat the damage award as representing "back pay" and thus "advisory" only, the Court nevertheless regards it as conclusive under Fed.R.Civ.P. 39(c).

basis other than *post hoc ergo propter hoc* reasoning to relate Kolstad's rejection for the post to her gender: to wit, Kolstad is female; she was rejected in favor of a "pre-selected" male for a position for which she was qualified; *ergo,* the reason for the "pre-selection" must have been sex.

Plaintiff invokes *dictum* from the Supreme Court's most recent exposition of Title VII law in the case of *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993), to the effect that a trier of fact *may* base a finding of discrimination solely on its disbelief of an employer's proffered "legitimate" reason for an adverse employment decision, although it is not compelled to do so. *See id.,* at ----, 113 S.Ct. at 2749. Here, Kolstad says, the jury obviously did not believe the ADA's witnesses, all of whom testified that, fairly comparing their credentials, Spangler's recent experience was thought to be more relevant, and that, for congressional lobbying purposes, his writing style was superior to Kolstad's.

Hicks, however, involved a non-jury trial, and the holding of the case merely reaffirmed the Supreme Court's seminal formulation of the standard of proof required to present a successful Title VII claim found in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981), namely, that even a finding of "pretext," i.e., that an employer's explanation of a suspect employment decision is disingenuous, is not actionable unless shown actually to have been a pretext *for discrimination.* The *Hicks* court, in reversing a decision of the 8th Circuit that had itself overturned the decision of a district court, sitting without a jury, in favor of a defendant-employer whose professed reasons for dismissing the plaintiff-employee the district judge had nevertheless refused to credit, asserted that "the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.' " *Hicks,* 509

U.S. at ----, 113 S.Ct. at 2749. In other words, "a reason cannot be proved to be 'a pretext for *discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Id.,* at ----, 113 S.Ct. at 2752 (emphasis in the original).

At least three appellate cases, from the 6th, 11th and 1st Circuits, albeit antedating *Hicks,* have expressly held that, in the absence of proof that a discriminatory motive underlies an adverse employment decision, disbelief of the pretextual reasons given for it cannot alone support a finding of discrimination if the evidence admits of some other--but not unlawful--motivation. *See Goostree v. State of Tennessee,* 796 F.2d 854, 862 (6th Cir.1986); *cert. denied,* 480 U.S. 918, 107 S.Ct. 1374, 94 L.Ed.2d 689 (1987); *White v. Vathally,* 732 F.2d 1037, 1040 (1st Cir.1984), *cert. denied,* 469 U.S. 933, 105 S.Ct. 331, 83 L.Ed.2d 267 (1984); *Clark v. Huntsville City Bd. of Education,* 717 F.2d 525, 529 (11th Cir.1983).[2] If *Hicks* were the only, and the most recent controlling authority, this Court would be reluctant to conclude that the requirement of at least some evidence of an illegal discriminatory animus had been abandoned. Unfortunately, *Hicks* is neither.

In a case directly on point, not yet a year old, and representing for this Court's purposes an authoritative interpretation of *Hicks,* the D.C.Circuit has held that, after a plaintiff's *prima facie* showing, juries, too (at their election, to be sure) may infer unlawful discrimination solely from a rejection of a defendant-employer's professedly innocent explanations as "pretext." *See Barbour v. Merrill,* 48 F.3d

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[2] All cited by Judge Revercomb in *Slade v. Billington,* 700 F.Supp. 1134 (D.D.C.1988).

1270, 1277 (D.C.Cir.1995). That, it would appear, is what the instant jury has done, and its verdict must therefore be allowed to stand.

Were it open to this Court to set aside the verdict under Fed.R.Civ.P. 50(c), however, the Court would do so. While the evidence may have been sufficient to have convinced the jury that Kolstad's candidacy for the position of Director of Legislation at ADA was treated cavalierly, and Spangler given a preference from the start, it is insufficient to prove *to the Court's satisfaction* that her sex or his more likely than not had anything to do with her rejection. Thus, in the absence of any grounds for action asserted other than the statutory Title VII claim of sex discrimination--Kolstad having made no claim on any other theory--the Court's equitable jurisdiction to complete the relief affords no basis for it to order a remedy for a wrong that it concludes has not been proven, the jury's verdict notwithstanding.

For the foregoing reasons, therefore, it is, this 22nd day of January, 1996,

ORDERED, that the motion of defendant American Dental Association for judgment as a matter of law is denied, and final judgment for plaintiff Carole Kolstad against the defendant in the amount of $52,718 is confirmed; and it is

FURTHER ORDERED, that the motion of plaintiff Carole Kolstad for an order of instatement to the position of Director of Legislation and an award of her attorney's fees and costs is denied.

APPENDIX D

United States Court of Appeals
For The District of Columbia Circuit

No. 96-7030
September Term, 1996
[FILED: MAY 28, 1997]

Carole Kolstad,

Appellant

v.

American Dental Association,

Appellee

Consolidated with 96-7047

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

The suggestion for rehearing *in banc* of the American Dental Association has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service voted in favor of the suggestion insofar as it pertains to the issue of punitive damages. Accordingly, it is

ORDERED that this matter will be reheard by the court sitting *in banc*. It is

FURTHER ORDERED that the judgment of the court filed on March 21, 1997, is vacated as to the issue of punitive damages.

A future order will govern further proceedings.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Garland did not participate in this order.

APPENDIX E

United States Court of Appeals
For The District of Columbia Circuit

No. 96-7030
September Term, 1996
[FILED: MAY 28, 1997]

Carole Kolstad,

Appellant

v.

American Dental Association,

Appellee

Consolidated with 96-7047

BEFORE: Wald, Williams and Tatel Circuit Judges

ORDER

Upon Consideration of the petition for rehearing of the American Dental Association, filed April 21, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judge Williams would grant the petition insofar as it pertains to the issue of punitive damages.

APPENDIX F

42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil Rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party–

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section–

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

* * *

(R.S. § 1977A, as added Pub.L. 102-166, Title I, § 102, Nov. 21, 1991, 105 Stat. 1072.)

FILED
SEP 28 1998
OFFICE OF THE CLERK

No. 98-208

In The

Supreme Court of the United States

October Term, 1997

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION

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September 1998

QUESTION PRESENTED

Whether punitive damages may be awarded in every case of intentional discrimination under Title VII, irrespective of whether there is egregious conduct.

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No. 98-208

In The

Supreme Court of the United States

October Term, 1997

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION

Petitioner seeks punitive damages on the basis of evidence deemed insufficient by the trial court judge to justify even a basic liability finding. Armed with scant circumstantial evidence, petitioner asks to fashion a rule of law that would allow a jury unfettered discretion to award punitive damages in every Title VII case of intentional discrimination, focusing on the "discriminator's mental state"

(Pet. 12), rather than on conduct exhibiting "malice or...reckless indifference to federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). The United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, rejected petitioner's position that mere intent to discriminate is sufficient to impose punitive damages in a Title VII case. The court's holding that "punitive damages in a Title VII case may be imposed only on a showing of egregious conduct" (Pet. App. 2a) faithfully implements the statutory standard.

STATEMENT OF THE CASE

Petitioner filed a claim in the United States District Court for the District of Columbia under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, alleging that she was denied a promotion because of her gender. She relied primarily on evidence that a male employee had been "pre-selected" for the job in question. After the close of evidence, before the jury was instructed, the district court dismissed petitioner's claim for punitive damages (Pet. App. 45a). The jury found the respondent liable.

Respondent filed a post-trial motion to set aside the jury verdict. The district court issued a decision finding that "no direct evidence of sex-based motivation on the part of the ADA was presented" (Pet. App. 71a). The district court further found that the only circumstantial evidence favorable to the petitioner was that the male had been "pre-selected" for the job (*id.*). There was nothing about the pre-selection, however, that was suggestive of gender-based discrimination. "What was missing, for present purposes, is evidence even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler," the district court found (*id.*). Nonetheless, the district court ruled it was compelled by circuit precedent to allow the jury

verdict to stand (Pet. App. 73a-74a). The court stated: "Were it open to this Court to set aside the verdict under Fed. R. Civ. P. 50(c), however, this Court would do so" (Pet. App. 74a).

The court of appeals panel affirmed the district court's failure to set aside the jury verdict (Pet. App. 46a-49a), but reversed the dismissal of petitioner's claim for punitive damages. The panel ruled that evidence sufficient to prove intentional discrimination is also sufficient to allow the jury to decide punitive damages (Pet. App. 49a-53a).

Respondent's suggestion for rehearing *en banc* was granted, limited to the issue of punitive damages (Pet. App. 75a-76a). The *en banc* decision of the court of appeals affirmed the district court's dismissal of the punitive damages claim (Pet. App. 22a). The court held that in order to recover punitive damages, there must be a showing of egregious conduct (Pet. App. 2a). It found no such evidence in this case (Pet. App. 20a-21a, footnote omitted):

> The evidence in this case does not show the kind of egregious discriminatory conduct necessary for the imposition of punitive damages. As the district court noted, 912 F.Supp. at 14-15 [Pet. App. 71a-72a], the jury's finding of discrimination appears to have been premised largely if not exclusively upon its apparent rejection, as mere pretext, of ADA's proffered rationales - that Kolstad's legislative experience and writing skills were inadequate. Whether such a rejection, by itself, is enough to support an award of *compensatory* damages is a question for a different *en banc* proceeding, see *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997) vacated pending rehearing

en banc, 124 F.3d 1302 (D.C. Cir. 1997), but in this case it falls far short of supplying grounds for a punitive award.

The court of appeals also found that while evidence of pre-selection might permit an inference that the employer's proffered reasons for an employment decision were pretextual, "pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful" (Pet. App. 21a). It concluded that "pre-selection is relevant only insofar as it logically supports an inference of discriminatory intent, i.e., trivially at best" (Pet. App. 22a).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE STANDARD FOR PUNITIVE DAMAGES UNDER TITLE VII.

The petition presents the question in what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act. The courts uniformly agree that outrageous or egregious conduct is required for the award of punitive damages. There simply is no conflict among the decisions of the circuit courts of appeals on the standards for the award of punitive damages under Title VII.

The petition correctly states that the District of Columbia Circuit held that "punitive damages in a Title VII case may be imposed only on a showing of egregious conduct" (Pet. 9, *quoting* Pet. App. 2a). Petitioner incorrectly states that this holding conflicts directly with decisions of the First, Second, Eighth, and Tenth Circuits, and indirectly with decisions in the Fifth, Seventh and Ninth Circuits. All these courts recognize that egregious or outrageous conduct is required for the imposition of punitive damages under Title VII.

Petitioner relies principally on *Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997). There the court upheld the jury's award of punitive damages based on the finding that the defendant's discriminatory conduct was "egregious and its wealth such that a large award was necessary to punish and deter a corporation of this size." 110 F.3d at 222. The Second Circuit thus endorsed the element of egregiousness in a punitive damages award.

What the Second Circuit rejected was the proposition that punitive damages awards must be based on conduct that is "extraordinarily egregious." This language, taken from remarks by Senator Dole and Representative Hyde, was found to be inconsistent with the standard adopted by Congress. *Id.* at 220. The petition is in error in stating that the D.C. Circuit adopted the "extraordinarily egregious" standard in its decision (Pet. 10, *citing* Pet. App. 10a). On that page the court quoted the sponsors' interpretative memorandum stating that, under 42 U.S.C. § 1981, punitive damages may be awarded "*in egregious cases*." Pet. App. 10a, *quoting* 137 Cong. Rec. S 15483 (October 30, 1991). Earlier in the opinion, the court quoted Senator Dole's "extraordinarily egregious" comment, but its own words were that "Congress intended to establish an egregiousness requirement for punitive damages as a matter of law" (Pet. App. 7a). Therefore, the court below did not embrace the "extraordinarily egregious" standard rejected by the Second Circuit in *Luciano*.

For the same reason there is no conflict between the decision below and the decision in *Adakai v. Front Row Seat, Inc.*, 125 F.3d 861 (table), 1997 WL 603458 (10th Cir. 1997). The *Adakai* court's statement that defendant's acts need not be "extraordinarily egregious," 1997 WL 603548 at **2, is not inconsistent with the requirement that such acts need to be egregious for an award of punitive

damages. The court referred to the "requisite level of recklessness or outrageousness" required to support punitive damages, *id.*, and recited the evidence supporting the punitive damages award in that case. *Id.* at **3.

Neither is there a conflict between the decision below and the decision in *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997), on the standard for punitive damages under Title VII. The defendant in *Kim* argued that punitive damages awards under 42 U.S.C. § 1981a should be limited to "exceptional circumstances of unusual bad motive that transcends ordinary intentional conduct." 123 F.3d at 1065. The Eighth Circuit viewed this as an argument similar to the "extraordinarily egregious" standard rejected in *Luciano*, and concluded that the proposed standard would require that a "plaintiff must demonstrate something more than that required by the statute to recover punitive damages." *Id.* at 1065-66. As in *Adakai*, the court concluded that the "requisite level of recklessness or outrageousness" was met by the evidence in the case. *Id.* at 1066.

Similarly, there is no conflict between the D.C. Circuit and the First Circuit on the standard for the award of punitive damages under Title VII. In *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996), the court stated: "There is no vested right to punitive damages on the part of the plaintiff and where allowed, they are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future."

Petitioner argues that there is an indirect conflict between the decision below and decisions in other circuits by citing examples of types of evidence found sufficient to trigger the imposition of punitive damages (such as participation by higher management or engagement in duplicitous behavior), and by deducing that the case below

would have turned out differently in those other courts (Pet. 12-14). Petitioner's argument points up no conflict among the circuits on any rule of law relating to the standard for punitive damages under Title VII. Moreover, decisions from the Fifth, Seventh, and Ninth Circuits that petitioner includes as the balance of the "seven other circuits" said to be in conflict with the decision below all are in accord with the holding of the D.C. Circuit that egregious or outrageous conduct is required for an award of punitive damages under Title VII.

The Ninth Circuit requires "evidence of conduct more egregious than intentional discrimination to support an award of punitive damages in Title VII cases." *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299, 1304 (9th Cir. 1998). In like manner, the Seventh Circuit has held that under Title VII "[p]unitive damages requires more" and presents a "higher hurdle than merely proving the underlying unlawful discrimination," and that once the higher hurdle is passed "the amount of punitive damages to which a plaintiff is entitled is determined by the degree of egregiousness of the underlying 'malice or reckless indifference'." *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996); *but see Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 581-82 (7th Cir. 1996). Both the Seventh Circuit and the Fifth Circuit have vacated punitive damages awards while upholding the finding of intentional discrimination, thereby negating petitioner's argument that evidence of mere intentional discrimination is sufficient to trigger the imposition of punitive damages under Title VII. *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1132-33 (7th Cir. 1997) (plaintiff "must go beyond proving" intentional discrimination to obtain punitive damages); *Farpella-Crosby v. Horizon Health Corp.*, 97 F.3d 803, 810 (5th Cir. 1996).

Two other circuits, not included in petitioner's conflict argument, also are in accord with the D.C. Circuit on the punitive damages standard under § 1981a. Pet. App. 19a; *see Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997) ("[p]unitive damages are an 'extraordinary remedy,' to be reserved for egregious cases"); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (evidence sufficient for basic liability finding "did not rise to the level" to support punitive damages).

Petitioner argues separately that the egregiousness requirement for punitive damages is inconsistent with the "reckless indifference" aspect of § 1981a (Pet. 12-13, 18-19). Petitioner states that the award of punitive damages turns "not on the particular type of discriminatory practice in which an employer may have engaged, but on the discriminator's mental state" (Pet. 12), and relies on the statement in *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987), that "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable." From this petitioner concludes that no additional requirement beyond intentional discrimination is necessary to put the punitive damages issue to the jury in every Title VII case.

The flaw in petitioner's argument is that it focuses on only one half of the equation in a punitive damages case under Title VII. The threshold in all cases is "intentional discrimination," 42 U.S.C. § 1981a(a)(1), so it is not remarkable that the same mental state required to prove liability might also furnish the basis for a punitive damages award.

But more than a certain state of mind is required for the award of punitive damages, whether based on malice or reckless indifference. The purpose of punitive damages is not to punish a defendant for a bad mental state, but to

punish him "for his outrageous conduct and to deter him and others like him from similar conduct in the future." *Smith v. Wade*, 461 U.S. 30, 54 (1983), *quoting* Restatement (Second) of Torts § 908(1)(1979). In assessing punitive damages, "[t]he focus is on the character of the tortfeasor's conduct...." *Id.*

II. PRE-1991 CIVIL RIGHTS ACT AUTHORITY DOES NOT FURNISH A BASIS FOR GRANT OF THE PETITION.

Although 42 U.S.C. § 1981a, allowing the award of punitive damages under Title VII, was not enacted until the 1991 Civil Rights Act, petitioner argues that conflicts under pre-1991 authority compel the grant of the petition. Petitioner points to conflicts among the circuits as to the standard for punitive damages under 42 U.S.C. § 1981 (which unlike § 1981a, contains no reference to punitive damages), and argues that the decision below is in conflict with this Court's decision in *Smith v. Wade*, *supra*, a case arising under 42 U.S.C. § 1983.

The Court need look no further than the analysis in the majority *en banc* decision below for a sound explanation as to why the pre-1991 Civil Rights Act authorities do not demonstrate a conflict with regard to the standard for punitive damages under Title VII in the 1991 Act.

First, the court of appeals examined the case law under § 1981 before the passage of § 1981a, finding that four courts of appeals had held that egregious misconduct beyond mere intent to discriminate was required for punitive damages (Pet. App. 8a). Two other courts of appeals, the First and Seventh Circuits, had held before the passage of § 1981a that "a finding of intentional discrimination, without more, is enough to put the question of punitive damages before the jury in the usual § 1981 case." Pet. App. 8a-9a,

citing Rowlett v. Anheuser-Busch, Inc., *supra*; *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290 (7th Cir. 1987). But both those courts have established a higher standard for punitive than for compensatory liability under § 1981a and, as noted above, have recognized that outrageous or egregious conduct is required to impose punitive damages under Title VII. *McKinnon*, *supra*; *Emmel*, *supra*; *see* Pet. App. 10a. Thus, the pre-1991 Civil Rights Act authority in the First and Seventh Circuits under § 1981 does not create a conflict with regard to punitive damages under § 1981a.

In a case in which certiorari was granted on the punitive damages standard under § 1981 and then later dismissed, the D.C. Circuit in *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C Cir. 1995), *cert. granted*, 116 S. Ct. 805, *dismissed after settlement,* 116 S. Ct. 1037 (1996), followed *Rowlett* in determining that "[n]o additional evidence is required" beyond proof of intentional discrimination in order to award punitive damages. Petitioner argues that the variance between *Barbour* and the decision below as to the punitive damages standard under § 1981 and § 1981a is inconsistent with the Congressional desire to apply a single standard to punitive damages claims under the civil rights laws (Pet. 15).

Whether the D.C. Circuit intends to conform its § 1981 analysis to the analysis in the decision below remains to be seen (though given the *en banc* decision that would seem more likely than the continued divergence scenario depicted in the petition). With respect to the question presented here, however, the D.C. Circuit is now aligned with other circuits in requiring evidence of outrageous or egregious conduct for punitive damages under Title VII, irrespective of whether there linger in a few circuits decisions under § 1981 imposing a lesser standard. Indeed, the conscious adoption of the outrageousness or egregiousness requirement under § 1981a by the D.C.

Circuit and those courts accepting a lesser punitive damages standard under § 1981 only reinforces the absence of a conflict on the standard in the statute which is the subject of the petition.

Second, the split among the circuits over the meaning of *Smith v. Wade*, relied upon in the petition (Pet. 17-18), essentially repeats the case division recited above with respect to § 1981 and thus similarly does not translate into a conflict on the punitive damages standard under § 1981a. The court of appeals meticulously catalogued all the references in *Smith* -- derived from common law, this Court's decisions, and the Restatement of Torts -- in favor of the requirement that punitive damages be based on outrageous or egregious conduct (Pet. App. 12a). The court also explained that the standard for compensatory damages in *Smith* already incorporated an egregiousness requirement, so there was not present the question of a higher evidentiary standard for punitive damages (Pet. App. 11a): "while the criterion adopted by the Court for punitive damages was not egregious in relation to the applicable compensatory standard, it clearly was so in relation to ordinary tortious conduct.... Thus the decision in *Smith* supports rather than refutes the idea that some form of egregiousness is essential for punitive damages."

Third, no conflict is presented by the decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), which rejected an egregiousness requirement for liquidated (double) damages due to "willful" violations of the ADEA. The court of appeals' observation that "liquidated damages under the ADEA and punitive damages under Title VII are not twins" (Pet. App. 15a) is litotes. Whereas Congress in § 1981a adopted language similar to that employed in *Smith v. Wade* (*see* Pet. 10a), there is no indication that Congress

meant to equate the ADEA's standard of willfulness with the standard for punitive damages under § 1981a.

III. THIS CASE PRESENTS NO ISSUE OF SUBSTANTIAL IMPORTANCE.

Petitioner argues that the case is important because a decision by this Court "will inform, if not control" the standard for punitive damages under § 1981 (Pet. 24). This Court once was presented the opportunity to address punitive damages under § 1981 and may have that opportunity again, in another case brought under that statute. But the instant petition is not the appropriate vehicle to resolve the standard under a different statute by indirect application. The consistent treatment by the courts of appeals of the punitive damages standard under § 1981a, the statute in question, counsels in favor of leaving for another day any residual conflicts under § 1981 regarding punitive damages.

Petitioner attempts to inflate the importance of this case by reference to the importance of the nation's civil rights laws (Pet. 25-26). The importance of laws prohibiting workplace discrimination is not in dispute. Yet even though petitioner incorrectly states that the court of appeals labeled this case "garden-variety" when it did not (Pet. 6, 25, *quoting* Pet. App. 18a), the factual context of this case punctuates the lack of merit of the petition and the lack of significance of the case.

This case does not present a close question on whether punitive damages should have been available. Indeed, had the district court judge not felt bound by circuit precedent to uphold the jury verdict, petitioner would not have prevailed on liability on the evidence of "pre-selection," "the only circumstantial evidence presented favorable to the plaintiff" (Pet. App. 71a). Petitioner did not prove "*to the Court's satisfaction* that her sex...had anything to do with

her rejection" (Pet. App. 74a). As the court of appeals pointed out, "pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful" (Pet. App. 21a). The preselection evidence inferentially supported a finding of discriminatory intent "trivially at best" (Pet. App. 22a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

September 1998

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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BNA, *Additional Showing of Egregious Conduct is Required to Support Punitive Damages Award Under Title VII, 158 LRR 106 (May 25, 1998)* 1

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REPLY BRIEF FOR PETITIONER

This is the case that prompted the National Law Journal headline, "D.C. Circuit Aggravates Title VII Split." *National Law Journal*, June 8, 1998, B1.

> The conflicting decisions—the earlier one from the 2d U.S. Circuit Court of Appeals and the more recent one from the D.C. Circuit—have drawn battle lines over the standard for imposing punitive damages under Title VII. . . .

Id.[1]

Respondent attempts to obscure this conflict by basing its brief on a straightforward but palpably mistaken hypothesis. It urges this Court to assume that there could be only two possible standards for punitive damages, either the D.C. Circuit requirement that "there must be a showing of egregious conduct" (Br. Opp. 3), or "a rule that would allow a jury unfettered discretion to award punitive damages in every Title VII case of intentional discrimination." (Br. Opp.

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[1] The story quoted a leading defense attorney as objecting, with regard to *Luciano v. Olsten Corp.*, 110 F. 3d 210 (2d Cir. 1997), that "under the 2d Circuit's approach, all disparate treatment cases would warrant punitive damages . . . ." *Id.*

A similar analysis in the Labor Relations Reporter described the same conflict:

> A majority of the divided [en banc court in *Kolstad*] weighs in on the side of those courts of appeals that have interpreted the punitive damages provisions of the Civil Rights Act of 1991 as not making such damages automatically available in a standard case of intentional discrimination. ***Other circuits hold that a finding of intentional discrimination suffices to put the issue of punitive damages to the jury.***

158 LRR 106 (1998)(Emphasis added).

1). Insisting that no court has adopted the latter rule,[2] Respondent infers that all the circuit courts must therefore follow the former.

However, as we explained in the petition, most courts in fact apply one or more of several intermediate rules, all of which conflict with the extraordinarily stringent D.C. Circuit standard. Those other circuits treat as sufficient to support an award of punitive damages evidence demonstrating either (1) "consciousness of wrongdoing" on the part of the employer, (2) involvement of management in the discriminatory action, (3) a deliberate scheme to perpetrate the discriminatory act, or (4) duplicitous behavior to cover up the discrimination. (Pet. 12-14).

Even the en banc majority acknowledged that its decision conflicted with the Second Circuit opinion in *Luciano v. Olsten Corp.*, 110 F. 3d 210 (2d Cir. 1997), which the court below correctly described as holding that, once intentional discrimination has been proven, "no additional evidence is required for punitive liability." (Pet. App. 20a). Respondent insists that the Second Circuit in fact adopted the D.C. Circuit's egregiousness standard, emphasizing that the word "egregious" can be found in the *Luciano* decision. (Br. Opp. 5). The utilization of that word in *Luciano*, however, occurs in an analysis upholding the amount of the punitive damage award, and is part of a passage explaining why the jury in that

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[2] Respondent also ignores totally the views of the five dissenting en banc judges, who did not espouse the latter rule. *See* Pet. App. at 28a-31a.

case awarded $5 million.[3] The word "egregious" is not part of the Second Circuit's standard as to when punitive damages can be awarded. To the contrary, *Luciano* held that the standard for punitive awards under Title VII should be the same as under section 1981:

> punitive damages [are] available for claims of race discrimination under 42 U.S.C. §1981 where defendant's conduct is motivated by an evil motive, or involves reckless indifference to federally protected rights. . . .

110 F. 3d at 220, and under section 1983:

> punitive damages awards [are available for] §1983 violations . . . when conduct is "motivated by evil motive or intent or when it involves reckless or callous indifference to the federally protected rights of others."

Id.

Respondent's insistence that the en banc opinion below is consistent with the decision in *Kim v. Nash Finch Co.*, 123 F. 3d 1046 (8th Cir. 1997), is particularly surprising. (Br. Opp. 6). The Eighth Circuit in *Kim* followed the Second Circuit's

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[3] The passage is as follows:

> The jury awarded Luciano $5,000,002 in punitive damages, finding Olstens's discriminatory conduct egregious and its wealth such that a large award was necessary o punish and deter a corporation of this size. Thus, it cannot be said that the district court erred in finding that with regard to a corporation as financially well-situated as Olsten, a punitive award of $300,000 was 'modest' and would not cause financial ruin.

110 F. 3d at 222. The district court had reduced the punitive award to $300,000 because of the statutory cap on such awards.

Luciano decision and expressly adopted the standard in the original panel decision written by Judge Tatel in this very case. 123 F. 3d at 1066. That panel decision is obviously inconsistent with the contrary holding of the en banc majority from which five active Circuit Judges dissented in an opinion authored by Judge Tatel. (Pet. App. 24a-41a). Respondent's argument that *Kim* merely found the statutory requirements were "met by the evidence in the case" (Br. Opp. 6) pointedly ignores the critical portion of the *Kim* decision which adopts a legal standard quite inconsistent with the decision in this case, holding that punitive damages can be awarded on without requiring plaintiff to demonstrate "something more than that required by the statute." 123 F. 3d at 1066.

Respondent dismisses the conflicting Ninth Circuit precedent in a single sentence, simply noting that that circuit requires "evidence of conduct more egregious than intentional discrimination." (Br. Opp. 7)(quoting *Ngo v. Reno Hilton Resort Corp.*, 140 F. 3d 1299, 1304 (9th Cir. 1998)). Again, Respondent simply ignores the rest of the opinion in *Ngo*, which goes on to explain what more than simple intentional discrimination is required in the Ninth Circuit:

> [T]o be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant "almost certainly knew that what he was doing was wrongful and subject to punishment."

140 F. 3d at 1304. The standard in *Ngo* obviously was satisfied in the instant case. More recently the Ninth Circuit held that punitive damages could also be awarded where a defendant had planned or attempted to cover up its discriminatory action:

> [T]he evidence regarding the attempts by Wal-Mart managers to cover up their discriminatory conduct

> supports the EEOC's claim of reckless indifference to Stern's federally protected rights. The EEOC's Enforcement Guidelines provide that evidence that an employer's agents "planned and/or attempted to conceal or cover-up the discriminatory practices or conduct" can support a finding that the employer acted "with malice or reckless indifference to the complaining party's federally protected rights." EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under 102 of the Civil Rights Act of 1991 . . . . In this case, the EEOC presented the jury with evidence that Wal-Mart provided false reasons for not hiring Stern.

EEOC v. Wal-Mart Stores, 1998 WL 652140 at *5 (9th Cir. Sept. 24, 1998). A similar cover up scheme was proven in the instant case.

Respondent describes *Adaki v. Front Row Seat, Inc.*, 1997 WL 603458 (10th Cir. 1997), as if it merely "recited the evidence supporting the punitive damages award in that case." (Br. Opp. 6). But *Adaki* actually expressly adopts a specific legal standard inconsistent with the en banc opinion in this case:

> The requisite level of recklessness or outrageousness [required to support punitive damages] can be inferred from management's participation in the discriminatory conduct.

1997 WL 603458 at *2 (bracketed material in original)(Quoting *Kim v. Nash Finch Co.*). That standard is easily satisfied by the facts of this case, in which the discriminatory decision involved Respondent's national executive director.

Respondent dismisses First Circuit precedent as holding no more than that "[t]here is no vested right to punitive damages . . . ." (Br. Opp. 6)(quoting *McKinnon v. Kwong Wah Restaurant*, 83 F3d. 498, 508 (1st Cir. 1996). To the contrary, decisions in that circuit—which Respondent totally ignores—have long held that proof of intentional discrimination alone will ordinarily be sufficient to support an award of punitive damages.

> This circuit has held that under federal law the evidence of intent that is necessary to support a punitive damages award "is the same [evidence of] 'intent' that is required for a finding of discrimination in the first place."

Criado v. IBM Corporation, 145 F.3d 437, 445 (1st Cir. 1998).

> A jury need not find some special sort of malign purpose in order to exact punitive damages in a disparate treatment case because the "intent" that is necessary to undergird an award of punitive damages in such a case is the same "intent" that is required for a finding of discrimination in the first place.

Dichner v. Liberty Travel, 141 F. 3d 24, 33-34 (1st Cir. 1998). *Dichner* quoted and relied the First Circuit's earlier decision in *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987), that "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable." *Id.* at 205. *McKinnon* simply reiterated this rule, adding only that a punitive award might not be appropriate where a defendant lacked "consciousness of wrongdoing", 83 F. 3d at 509, a mitigating circumstances obviously absent in the instant case.

That the decision below conflicts with this Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983), is strikingly illustrated by a simple comparison of Respondent's description of the decision below with the actual holding in *Smith* itself.

> [M]ore than a certain state of mind is required for the award of punitive damages . . . . The purpose of punitive damages *is not to punish a defendant for a bad mental state*, but to punish him "for his outrageous conduct and to deter him and others like him from similar conduct." . . . . The court of appeals meticulously catalogued all the references in *Smith* . . . in favor of the requirement that punitive damages be based on outrageous or egregious conduct.

(Br. Opp. 8-11)(Emphasis added). *Smith* itself, however, states at its conclusion:

> We hold that a jury may be permitted to assess punitive damages . . . when the defendant's conduct is shown *to be motivated by evil motive or intent*, or when it involves reckless or callous indifference to the federally protected rights of others.

461 U.S. at 56 (Emphasis added).

In response to Petitioner's argument that the decision below represents a nearly identical attempt to engraft an "egregiousness" standard onto a discrimination statute which this Court disapproved in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (Pet. 22a-23a), involving the ADEA, Respondent claims that "there is no indication that Congress meant to equate the ADEA's standard of willfulness with the standard for punitive damages under §1981a." (Br. Opp. 11-12). This Court, however, reaffirmed in *Hazen Paper* the

definition of "willful" under the ADEA, which had been adopted in *Trans World Airlines v. Thurston*, 468 U.S. 111, 126 (1985): "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." 507 U.S. at 617. That definition is the precise analog of the language Congress chose to incorporate in §1981a(b)(1). The decision below simply cannot be reconciled with this Court's holding in *Hazen Paper* that "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation. . . ." (*id.*), in order to recover liquidated (double) damages.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia.

Respectfully submitted,

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No. 98-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROLE KOLSTAD,

Petitioner,

vs.

AMERICAN DENTAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, and PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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CONSENT OF PARTIES

Petitioner and Respondent have consented to the filing of this brief, *amici curiae*.[1]

INTERESTS OF THE AMICI CURIAE

Mexican American Legal Defense and Educational Fund ("MALDEF") is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States. MALDEF is particularly dedicated to securing such rights in the areas of employment, education, immigration, political access and public resource equity. The question presented by this case is of great interest to MALDEF because it implicates the scope of the remedies available to victims of discrimination, as well as how courts should view the act of intentional discrimination itself.

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended. NWLC has a deep and abiding interest in assuring the eradication of discrimination against women in the workplace.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national civil rights organization that exists to

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[1] Their consents have been filed with the clerk of this Court. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

ensure that every Puerto Rican as well as other Latinos are guaranteed equal opportunities to succeed. Through litigation, advocacy and education, PRLDEF has initiated hundreds of cases to combat discrimination in significant areas such as education, housing, employment, voting and language rights. PRLDEF supports Petitioner Kolstad's position in this matter since the circuit court's decision, if allowed to stand, threatens to limit an important and necessary remedy available to the Latino community.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.[2]

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[2] *Amici*'s interest in this issue is far from academic. In 1997, Hispanics filed approximately 9000 charges with the United States Equal Employment Opportunity Commission ("EEOC") and Fair Employment Practice Agencies seeking relief for discrimination on the basis of race and/or national origin. This constituted approximately eleven percent of all charges filed alleging race discrimination and more than fifty percent of all charges alleging discrimination due to national origin. More than 24,000 charges were filed in 1997 with the EEOC alleging discrimination on the basis of gender. *See* United States Equal Employment Opportunity Commission, Office of Communications and Legislative Affairs, *EEOC and FEPA Receipts, Charges Filed By Hispanics Received in Fiscal Year 1997, Statute/Basis Summary of Issues;* EEOC National Database: 1997 *Charges Filed Alleging Sex Discrimination.*

SUMMARY OF ARGUMENT

Each year, tens of thousands of men and women commence civil actions in federal court to vindicate their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended ("Title VII"). Undeniably, the vast majority of these individuals allege that their employers have intentionally discriminated against them because of their race, gender, religion, ethnicity, or national origin. The Civil Rights Act of 1991 (the "1991 Act") allows for punitive damages in such cases upon a showing that the defendant acted with malice or reckless disregard of the plaintiff's rights. By conditioning the availability of punitive damages upon a showing of "egregiousness," the Court of Appeals for the District of Columbia creates a hurdle for employees not found in or supported by the plain language of the statute, usurps their right to a jury, and undermines important aspects of this nation's civil rights policy. This Court's review is needed both to address this important issue and to resolve the division which has developed among the circuits regarding the appropriate standard for punitive damages under the 1991 Act.

REASONS FOR GRANTING THE PETITION

I. THE OUTCOME OF THIS CASE WILL DEFINE THE REMEDIES AVAILABLE TO THOUSANDS OF VICTIMS OF DISCRIMINATION

Approximately 40,000 civil rights cases were commenced in federal court during the twelve month period ending June 30, 1998.[3] Of these, more than 400 were filed in the District Court for

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[3] Administrative Office of the United States Courts, *Table C-3: Federal Judicial Caseload Statistics, June 30, 1998.*

the District of Columbia, representing more than twenty five percent of all civil cases commenced in the district that year.[4] Nationwide, the majority of civil rights cases involve allegations of employment discrimination.[5]

A significant percentage of employment discrimination actions reach trial. For example, in 1997 alone, federal trials were held in more than 1,100 employment discrimination suits, constituting more than twenty five percent of all federal question civil trials.[6] In nearly eighty percent of those cases, the plaintiff elected to have his or her case heard by a jury.[7] As these statistics suggest, the outcome of this case will define and limit the damages available to the plurality of litigants seeking to vindicate their federal rights in federal court.[8]

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[4] *Id.*

[5] Administrative Office of the United States Courts, *Table C-2A: U.S. District Courts Civil Cases Commenced, By Nature of Suit During 12 Month Periods Ended June 30, 1994 through 1998*, Employment Civil Rights Cases for 12 Months Ended June 30, 1998: 23,804.

[6] Administrative Office of the United States Courts, *Table C-4: U.S. District Courts Civil Cases Terminated, By Nature of Suit And Action Taken, During The 12 Month Period Ended June 30, 1997.*

[7] *Id.*

[8] In the year ending March 31, 1997, more civil rights actions were commenced in federal court than any other category of civil case as defined by the Statistics Division of the Administrative Office of the United States Courts. Administrative Office of the United States Courts, *Table C-3: Federal Judicial Caseload Statistics, March 31, 1997.*

The right of a Title VII plaintiff to submit his or her punitive damages claim to a jury now largely depends on the circuit court in which the claim was filed. *Amici* agree with Petitioner that a significant split among circuit panels has developed with respect to the standard for punitive damages under 42 U.S.C. § 1981a(b)(1) (Pet. at pp. 9-19), that this circuit conflict affects thousands of litigants each year, and that it justifies the exercise of this Court's certiorari jurisdiction.

II. THE MAJORITY EN BANC DECISION BELOW IS IN CONFLICT WITH THE PLAIN LANGUAGE OF THE 1991 ACT AND PRIOR DECISIONS OF THIS COURT

The 1991 Act provides that a plaintiff may recover punitive damages upon showing that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to [his or her] federally protected rights . . . ." 42 U.S.C. § 1981a(b)(1). Section 1981a(b)(1) is modeled on the standard for punitive damages explicated by this Court in *Smith v. Wade*, 461 U.S. 30, 52 (1983). *See* H.R. Rep. No. 40, 102d Cong., 1st Sess. 74 (1991), *reprinted in* 1991 U.S.C.C.A.N 549, 612.

In *Smith v. Wade*, this Court established a functional framework for determining the availability of punitive damages in a suit brought under 42 U.S.C. § 1983. Noting that "society has an interest in deterring and punishing *all* intentional and reckless invasions of the rights of others, even though it sometimes chooses not to impose liability for lesser degrees of fault," this Court held that the question of whether a defendant's conduct "met the recklessness threshold" was a question of ultimate fact for the jury. *Smith v. Wade*, 461 U.S. at 52-54 (emphasis in original).

The majority *en banc* decision departs from this Court's decision in *Smith v. Wade*, in holding that an award of punitive damages is not within the province of the jury in cases of "garden-variety" intentional discrimination, but only when the defendant's conduct is "egregious." 139 F.3d at 968. This interpretation cannot be squared with the plain language of the statute. The term "egregious" does not appear in Section 1981a(b)(1), and the 1991 Act is bereft of any other language justifying a heightened standard for punitive damages. Quite simply, the statute does not support the reading which the court below attributes to it.

Additionally, the stated rationale for the majority *en banc* decision--that the "remedial structure" of the statute requires a different standard for liability and damages--was expressly rejected by this Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993). *Hazen* held that proof of intentional discrimination on the basis of age is sufficient to establish that the employer acted with "reckless disregard" of an employee's rights under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.. No heightened showing was necessary in order to obtain liquidated damages; indeed, this Court found that a requirement of "egregiousness" imposed by several circuits at the time was just plain wrong. *Id.* Now, five years on, the District of Columbia and Sixth Circuit, unmindful of this Court's admonishment, have again imposed a heightened punitive damages requirement. *Amici* support Petitioner's request for review so that this important question can be definitively resolved.

III. THE COURT BELOW IMPROPERLY USURPED THE JURY'S ROLE IN ASSESSING PUNITIVE DAMAGES

The creation by the court below of an "egregiousness" standard substantially undermines the jury's role in assessing punitive damages. It has long been understood that determining the

gravity of a defendant's misconduct is a function particularly suited to members of a jury, who are more likely to be attuned and sensitive to prevailing societal norms and thus better able than the court to decide when the violation of those norms has been "reckless." *See Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763) (award of punitive damages within the jury's discretion "as proof of the detestation of the jury to the action itself"). The Second Circuit Court of Appeals recently explained the continuing importance of this role in the context of a sex harassment claim:

> A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. Such an effort, even were it successful, would produce questionable legal definitions for the workplace where recognition of employees' dignity might require standards higher than those of the street . . . [t]oday, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation. . . . [w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.

Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998), citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955) ("[j]uries fairly chosen from different walks of life bring into the

jury box a variety of different experiences, feelings, intuitions, and habits").

These concerns also apply to a claim of discrimination based on race, ethnicity, or national origin, where issues of culture, language and identity are often implicated. In such cases, whether or not one believes that an employer discriminated with "malice" may turn upon one's perception and understanding of the subtle stereotypes that sometimes infiltrate working relationships and poison working conditions. A jury selected from a cross-section of the community is particularly well-suited to make that determination.[9]

The issue is not simply one of the decision-maker's race, gender or ethnicity. Federal judges, as a group, are less likely to have the broad life experiences possessed by members of a jury drawn from a cross-section of the community. For example, in this case, the court below concluded that there was nothing "egregious" about denying Kolstad the promotion she sought because of her gender. However, a jury of her peers might have included men and women who had experienced job discrimination in their own lives, or who had witnessed the insidious machinations of pre-selection at companies where they had worked. What

[9] In 1998, Latinos comprise approximately eleven percent of the U.S. population. However, only 4.2 percent of the judges actively serving on the federal bench are Latino. Women are also substantially underrepresented on the bench: while women comprise more than fifty percent of the U.S. population, only eighteen percent of sitting federal judges are female. United States Department of Commerce, Bureau of the Census, Population Division, *Population Paper Listing-91, Appendix A;* Alliance for Justice, *Demographic Portrait of the Federal Judiciary as of August 3, 1998.*

is certain is that the Kolstad jury saw the evidence presented, heard the testimony of witnesses, and was well-positioned to determine whether Respondent acted with malice or reckless disregard of Kolstad's rights when it discriminated against her on the basis of her gender. By denying the jury the opportunity to speak on this issue, the court below has frustrated the effectiveness of the 1991 Act in two material ways: first, by diminishing the scope of the remedy afforded to victims of discrimination; second, by taking away the right to a jury trial.[10]

In usurping the jury's traditional role in assessing a defendant's conduct for purposes of punitive damages, the court below endorses a "raised eyebrow" test of its own, unguided by the quantum of outrage the jury might have felt toward Respondent's actions. Such distrust of the jury's common sense and sensibilities is inappropriate. *Cf. BMW of North America, Inc. v. Gore*, 517 U.S. 559, 613 (1996) (Ginsburg, J. dissenting) (noting this Court's "longstanding reluctance" to review the size of jury verdicts in federal court proceedings); *see also Gore*, 517 U.S. at 600 (Scalia, J. dissenting) ("[t]oday's decision . . . is really no more than a

[10] The court below's conclusion is also at odds with guidelines issued by the EEOC indicating that the jury rather than the judge should determine the applicability of punitive damages under the 1991 Act. See *EEOC Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act*, Section II.B.1., issued July 7, 1992 ("conscious, purposeful discrimination may be sufficient to warrant punitive damages"). The court below erred by failing to accord deference to the EEOC's interpretation. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury. . . .")[11]

Even if the court below is correct that some heightened showing above and beyond the standard for liability is required before punitive damages may be awarded, its choice of "egregiousness" is untenable because it lacks three basic qualities of a legal rule or standard: uniformity; predictability; and reviewability. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev., Nov. 1992, at 65 (citing uniformity, predictability, and "separating matters of law from matters of fact" as characteristics of a rule-based jurisprudential approach). A judge's decision must be guided either by a defined rule or a textured standard that takes factual variants into consideration. For example, the EEOC suggests a number of factors that a jury might consider in deciding whether to assess punitive damages, including: proof of threats or deliberate retaliatory action; the employer's early efforts at remediation; the existence of similar past discriminatory conduct; the duration of the discriminatory conduct; the nature, extent and severity of the harm suffered by the employee; and the degree of egregiousness and nature of the

[11] In *Gore*, this Court held that a punitive damages award of $2 million in a case involving fraud in the sale of a repainted automobile was so grossly excessive as to violate the due process clause of the Fourteenth Amendment. 517 U.S. at 574-75. The due process concerns underlying this Court's decision in *Gore* are not present here, of course, where the appellate court's decision precludes the issue from even reaching the jury. Indeed, these concerns could not be present, because the 1991 Act imposes strict limitations on the size of punitive and compensatory damage awards. The largest possible award under the 1991 Act is $300,000 inclusive of punitive *and* compensatory damages. *See* 42 U.S.C. § 1981a(b)(3).

employer's conduct. *EEOC Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act*, issued July 7, 1992. At the very least, the existence of factual questions related to any of the above factors should be sufficient to send the issue of punitive damages to the jury.

Here, the court below simply offers up the value judgments of the particular judge presiding over the trial, in the same manner in which it imposed its own value judgments by minimizing the misconduct proven against Respondent.[12] The certainty exhibited by the court below in the correctness of that moral judgment, unguided by any objective criteria and disconnected from the sensibilities of the jury, is unwarranted. This case offers this Court the opportunity to delineate the proper roles of judge and jury in assessing punitive damages and to decide what rule or standard should govern such awards under the 1991 Act.

[12] The court below itself highlights the flawed nature of the "egregiousness" standard in comparing the present case with *Smith v. Wade*. In order to justify its strained interpretation of *Smith v. Wade*, the court below characterizes as "egregious" the prison guard's behavior in that case, but concludes that intentionally locking Kolstad out of the promotional process because of her gender is not. 139 F.3d at 964, 969. However, reasonable people could reach an entirely different conclusion: that Respondent's conduct here was "egregious" because it was committed with the intent to deny Petitioner advancement in her profession because of her gender, while Smith's conduct was not "egregious" because he never intended to cause any injury to the inmate under his care. 461 U.S. at 32-33.

IV. THE MAJORITY EN BANC DECISION UNDERMINES NATIONAL CIVIL RIGHTS POLICY AGAINST DISCRIMINATION IN EMPLOYMENT

Title VII and the 1991 Act embody our national policy against discrimination in the workplace, reflecting "a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995) (noting that the ADEA and Title VII are part of a "wider statutory scheme to protect employees in the workplace nationwide"). Through this legislation, Congress has expressed its view that discrimination against an employee because of his or her gender, race, religion, ethnicity, or national origin is an evil worthy of sanction. Indeed, "disparate treatment was the most obvious *evil* Congress had in mind when it enacted Title VII." *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977) (emphasis added); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J. concurring) ("[t]here is no doubt that Congress considered reliance on gender or race in making employment decisions as evil in itself").

The majority *en banc* decision undermines this nation's civil rights policy in at least two respects. First, by limiting punitive damages to "egregious" cases of intentional discrimination, the court below eviscerates the deterrent value of Section 1981a(b)(1) with respect to an entire class of cases. A primary purpose of federal civil rights legislation has always been the deterrence of future unlawful conduct. *McKennon*, 513 U.S. at 358; *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975). However, Congress found that the equitable remedies initially available under Title VII proved ineffective at deterring discrimination in the workplace. For example, a victim of unlawful discrimination who quickly mitigated her back pay damages

by locating replacement employment could obtain no monetary relief from the court. The absence of any financial penalty for discrimination meant that companies lacked an economic incentive to stop discriminating. *See, e.g., Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (noting in the context of a suit under 42 U.S.C. § 1983 that "the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future"). The 1991 Act was designed to close this loophole by imposing an economic cost for intentional discrimination where one might not have otherwise existed, thereby fundamentally changing the way corporate America looks at the issue of bias in the workplace. *See* H.R. Rep. No. 40, 102d Cong., 1st Sess. at 69-70, *reprinted in* 1991 U.S.C.C.A.N. at 607-608. By denying punitive damages to an entire class of discrimination victims, the court below releases employers who unlawfully discriminate from the obligation of paying for their bad acts.

Second, the artificial categorization of intentional discrimination by the court below into "garden-variety" cases and "egregious" cases, 139 F.3d at 968, evinces an insensitivity to the problem of workplace bias that is without textual or historical foundation. *See Teamsters*, 431 U.S. at 335. It implies that discrimination is reprehensible only when an employer uses racially inflammatory language or leaves some other "smoking gun" evidence of his malicious intent. But intentional discrimination is no less insidious because it is done secretly, without the use of racial epithets or sexually demeaning language. Indeed, the most despicable discriminator may be the one who does his dirty work with a smile on his face. As we near the end of the twentieth century and the thirty-fifth anniversary of the Civil Rights Act of 1964, sophisticated employers who create a glass ceiling for women and minorities in the workplace may have learned to be circumspect about the language they use while engaging in discrimination.

However, it is their actions, not simply their words, that Congress sought to remedy, deter, and punish.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petition for a writ of certiorari to determine the appropriate standard for assessing punitive damages under Section 1981a(b)(1) of the 1991 Act.

Respectfully submitted,

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September 29, 1998

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Supreme Court, U.S.
FILED
DEC 17 1998
OFFICE OF THE CLERK

(16)

No. 98-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED July 31, 1998
CERTIORARI GRANTED NOVEMBER 2, 1998

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U.S. District Court
USDC District of Columbia (Washington)

KOLSTAD v. AMERICAN DENTAL [ASS'N] Filed: 07/19/94

CIVIL DOCKET FOR CASE #: 94-CV-1578

7/19/94	1	COMPLAINT filed by plaintiff(s) CAROLE KOLSTAD; jury demand; (kmk) [Entry date 07/20/94] [1:94cv1578]
		* * *
8/9/94	2	ANSWER TO COMPLAINT [1-1] by defendant AMERICAN DENTAL. (clv) [Entry date 08/10/94] [1:94cv1578]
8/30/94	3	MEET AND CONFER STATEMENT/REPORT PURSUANT TO L.R. 206(d) filed by plaintiff(s) CAROLE KOLSTAD, defendant AMERICAN DENTAL. (clv) [Entry date 08/31/94] [1:94cv1578]
		* * *
9/13/94	5	ORDER by Judge Thomas P. Jackson; directing initial disclosures by FRCP 26 due 9/23/94; all parties shall be joined by 10/1/94; experts shall be identified by 12/1/94; rebuttal expert witnesses shall be identified by 1/1/95; discovery be completed by 2/1/95; dispositive motion due 3/1/95; oppositions due 3/15/95; replies due 3/26/95; pretrial to be held after 6/30/95; and trial on 10/16/95. (N) (rew) [1:94cv1578]

9/27/94	6	MEET AND CONFER STATEMENT/ REPORT PURSUANT TO L.R. 206(d) filed by plaintiff(s) CAROLE KOLSTAD. (clv) [Entry date 09/28/94] [1:94cv1578]

* * *

8/30/95	—	CASE REFERRED to Mag. Judge Deborah A. Robinson for pretrial (ldc) [Entry date 08/31/95] [1:94cv1578]
9/8/95	8	ORDER by Mag. Judge Deborah A. Robinson : setting pretrial conference for 9:30 9/26/95; (N) (bh) [1:94cv1578]
9/15/95	9	PRETRIAL STATEMENT by plaintiff CAROLE KOLSTAD.; exhibits (3) (dam) [Entry date 09/18/95] [1:94cv1578]
9/18/95	10	MOTION filed by defendant AMERICAN DENTAL in limine; exhibits (3) (dam) [Entry date 09/19/95] [1:94cv1578]
9/18/95	11	PRETRIAL STATEMENT by defendant AMERICAN DENTAL. (dam) [Entry date 09/19/95] [1:94cv1578]

* * *

9/25/95	13	RESPONSE by plaintiff CAROLE KOLSTAD in opposition to motion in limine [10-1] by AMERICAN DENTAL; exhibits (3). (kmk) [Entry date 09/26/95] [1:94cv1578]

* * *

9/29/95	16	REPLY by defendant AMERICAN DENTAL to plaintiff's opposition to defendant's motion in limine [10-1]. (tth) [Entry date 10/02/95] [1:94cv1578]
9/29/95	17	(SUPPLEMENTAL) MEMORANDUM by plaintiff CAROLE KOLSTAD concerning admissibility of the RESNICK consent decree; exhibits (1) (dam) [Entry date 10/02/95] [1:94cv1578]
10/10/95	18	FINAL PRE-TRIAL ORDER by Mag. Judge Deborah A. Robinson (N) (bh) [1:94cv1578]

* * *

10/10/95	21	(SUPPLEMENTAL) PRETRIAL STATEMENTS by plaintiff CAROLE KOLSTAD (dam) [Entry date 10/12/95] [1:94cv1578]

* * *

10/17/95	22	MOTION filed by defendant AMERICAN DENTAL for reconsideration of Magistrate Judge's pre-trial order [18-1] (dam) [Entry date 10/18/95] [1:94cv1578]

* * *

10/17/95	25	RESPONSE by plaintiff CAROLE KOLSTAD in opposition to defendant's motion for reconsideration of its in limine motion [18-1] [22-1] by AMERICAN

		DENTAL. (dam) [Entry date 10/18/95] [1:94cv1578]
10/18/95	—	JURY TRIAL before Judge Thomas P. Jackson: motion of defendant to reconsider ruling of Magistrate held in abeyance; jury of 8 selected and sworn; trial begun and continued to 10:00 10/19/95. Reporter: Phyllis Merana (dbw) [1:94cv1578]
10/19/95	—	JURY TRIAL. . .resumed and continued....
10/20/95	—	JURY TRIAL...resumed and continued....
10/23/95	—	JURY TRIAL...resumed and continued....
10/23/95	26	STIPULATION filed and fiated by Judge Thomas P. Jackson as to testimony of witness Bruce W. Hamilton, exhibit. (N) (rew) [1:94cv1578]

* * *

10/24/95	—	JURY TRIAL...resumed and continued....
10/25/95	—	JURY TRIAL...resumed and continued....
10/26/95	—	JURY TRIAL...resumed and concluded, jury begins deliberations, verdict, for the Plaintiff in the amount of $52,718.00, jury not polled, jury discharged, 3 notes filed. 10 days for post trial motions, motions hearing set for 12/5/95 at 9:30 am. reporter: P. Merana (rew) [Edit date 10/26/95] [1:94cv1578]

10/26/95	34	JUDGMENT by Judge Thomas P. Jackson in favor of plaintiff CAROLE KOLSTAD against defendant AMERICAN DENTAL in the amount of $52,718.00 with costs. (rew) [Entry date 11/17/95] [1:94cv1578]

* * *

11/22/95	38	TRANSCRIPT filed for date(s) of 10/25/95....

* * *

1/22/96	45	TRANSCRIPT filed for date(s) of 01/5/96....
1/22/96	46	MEMORANDUM AND ORDER by Judge Thomas P. Jackson : denying motion for award of attorneys' fees and litigation expenses against AMERICAN DENTAL [37-1] by CAROLE KOLSTAD, denying motion for judgment as a matter of law [32-1] by AMERICAN DENTAL (rew) [Entry date 01/25/96] [1:94cv1578]
2/15/96	47	TRANSCRIPT filed for date(s) of 01/18/95....
2/16/96	48	NOTICE OF APPEAL by plaintiff CAROLE KOLSTAD from order [46-1], entered on: 01/22/96....

* * *

3/1/96	49	NOTICE OF APPEAL by defendant AMERICAN DENTAL from order [46-1], entered on: 01/22/96. $100.00 docketing fee and $5.00 filing fee paid. Attorney's to receive copies are Elizabeth T. Donzella, Bruce S. Harrison and Joseph A. Yablonski. (dam) [Entry date 03/04/96] [1:94cv1578]
3/5/96	50	MOTION filed by defendant AMERICAN DENTAL to stay of enforcement of judgment on jury verdict (dam) [Entry date 03/06/96] [1:94cv1578]

* * *

3/18/96	51	ORDER by Judge Thomas P. Jackson : granting motion to stay of enforcement of judgment on jury verdict without supersedeas bond [50-1] by AMERICAN DENTAL (N) (rew) [Entry date 03/19/96] [1:94cv1578]
3/21/96	52	TRANSCRIPT filed for date of 10/20/95....
3/25/96	53	TRANSCRIPT filed for date(s) of 10/18/95....
3/25/96	54	TRANSCRIPT filed for date(s) of 10/25/95....
3/25/96	55	TRANSCRIPT filed for date(s) of 10/26/95....

3/25/96	56	TRANSCRIPT filed for date(s) of 10/24/95....
3/25/96	57	TRANSCRIPT filed for date(s) of 10/23/95....
4/17/96	58	TRANSCRIPT filed for date(s) of 10/19/95....
7/2/97	59	ORDER by Judge Thomas P. Jackson consolidating CA94-1578 and CA97-306 pending further order of the Court. (N) (rew) [Entry date 07/03/97] [1:94cv1578]

* * *

7/15/97	63	ORDER by Judge Thomas P. Jackson : granting in part motion for reconsideration of order [59-1] consolidating Civil Actions 94-1578 and 97-306 [61-1] by AMERICAN DENTAL in 1:94-cv-01578, and the Courts order of July 2 is amended to consolidate these cases upon return of Mandate from the U.S. Court of Appeals. (N) (rew) [Entry date 07/21/97] [1:94cv1578 1:97cv306]

* * *

8/12/97	—	STATUS HEARING before Judge Thomas P. Jackson, motion of plaintiff filed in CA 97-306 to disqualify counsel heard and denied without prejudice. Reporter: P.

USDC District of Columbia
Civil Docket for Case #: 94-CV-1578

Merana (rew) [Edit date 08/12/97] [1:94cv1578]

* * *

5/27/98	—	Case Reopened (rew) [Entry date 06/03/98] [1:94cv1578]
5/28/98	65	CERTIFIED COPY of judgment filed in USCA dated 5/8/98, on appeal [49-1], appeal [48-1], affirming the judgment of USDC. OPINION USCA # 96-7030 & 96-7047 (cjp)

GENERAL DOCKET FOR
D.C. Circuit Court of Appeals

Court of Appeals Docket #: 96-7030 Filed: 2/27/96
Nsuit: 3442 Civil Rights: Jobs
Kolstad, Carole v. Amer Dent Assn
Appeal from: U.S. District Court

96-7030	Kolstad, Carole v. Amer Dent Assn
2/27/96	CIVIL-PRIVATE CASE docketed. Notice of Appeal filed by Appellant Carole Kolstad. [96-7030]

* * *

3/11/96	CLERK'S ORDER filed to consolidate case numbers 96-7030 & 96-7047 as cross appeals....

* * *

6/20/96	CLERK'S ORDER filed to schedule oral argument before Judge Initials: PMW SFW DST on 11/15/96....

* * *

7/31/96	BRIEF filed by Appellant Carole Kolstad in 96-7030 Copies: 15. Certificate of service date.
7/31/96	JOINT APPENDIX filed by Appellant Carole Kolstad in 96-7030, Appellee Amer Dent Assn in 96-7030, Appellee Carole Kolstad in 96-7047, Appellant Amer Dent Assn in 96-7047. Copies: 10. [Volumes I & II] Certificate of service date 7/29/96.

* * *

8/30/96 BRIEF filed by Appellee/Cross-Appellant American Dental Association in 96-7030, 96-7047 Copies: 15. Certificate of service date 8/30/96.

8/30/96 SUPPLEMENTAL JOINT APPENDIX filed in 96-7030, 96-7047 Copies: 10. Certificate of service date 8/30/96.

* * *

9/18/96 BRIEF lodged by Appellee Amer Dent Assn in 96-7030. Copies: 15. Certificate of service date 9/18/96.

* * *

9/23/96 PER ABOVE ORDER lodged appellee brief is filed.

* * *

10/11/96 REPLY BRIEF filed by Appellant Carole Kolstad in 96-7030, Appellee Carole Kolstad in 96-7047 [229503-1]. Copies: 15 Certificate of service date 10/11/96.

10/18/96 CROSS-APPELLANT'S REPLY BRIEF filed by Appellant American Dental Association in 96-7047. Copies: 15. Certificate of service date 10/18/96.

10/29/96 PER CURIAM ORDER filed to allocate oral argument times....

* * *

11/15/96 ORAL ARGUMENT HELD before Wald, Williams, Tatel. [96-7030, 96-7047] (ddm) [96-7030 96-7047]

3/21/97 JUDGMENT for the reasons in the accompanying opinion affirming the district court's denial of ADA's motion for judgment as a matter of law, case remanded for trial on punitive damages. Before Judges Wald, Williams, Tatel. [96-7030, 96-7047] (edb) [96-7030 96-7047]

3/21/97 OPINION (15 pgs) for the Court filed by Judge Tatel, CONCURRING IN PART & DISSENTING IN PART OPINION (12 pgs) filed by Judge Williams. [96-7030, 96-7047] (edb)

* * *

4/21/97 PETITION for rehearing in 96-7030, in 96-7047 and SUGGESTION, for rehearing in banc in 96-7030, in 96-7047 (19 copies) filed by Appellee Amer Dent Assn in 96-7030, Appellant Amer Dent Assn in 96-7047 (c/s dated 4/18/97)

5/28/97 PER CURIAM ORDER filed that the petition for rehearing be denied. Before Judges Wald, *Williams, Tatel. [96-7030, 96-7047] *CIRCUIT JUDGE Williams would grant the petition insofar as it pertains to the issue of punitive damages. (wmw) [96-7030 96-7047]

5/28/97 PER CURIAM ORDER, In Banc, filed that the suggestion for rehearing will be reheard by the court sitting in banc. FURTHER ORDERED that the judgment of the court filed on March 21, 1997, is vacated as to the issue of punitive damages. A future order will govern further proceedings. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, *Garland. [96-7030, 96-7047] *Circuit Judge Garland did not participate in this order. (wmw) [96-7030 96-7047]

6/5/97 PER CURIAM ORDER, In Banc, filed scheduling in banc oral argument on 9/22/97 at 10 a.m.; The parties are the directed to file briefs concerned with the issue of punitive damages only....

* * *

7/1/97 IN BANC BRIEF filed by Appellee/ Cross-Appellant American Dental Association. Copies: 30. Certificate of service date 7/1/97.

8/1/97 BRIEF filed by Appellee/Coss-Appellant Carole Kolstad in 97-7030/96-7047. Copies: 30. Certificate of service date 8/1/97.

8/5/97 MOTION filed (5 copies) (certificate of service dated 8/1/97) to allow amicus curiae. Response due on 8/11/97 in 96-7047, in 96-7030. Motion filed by Movant-Amicus EEOC in 96-7047, 96-7030.

8/5/97 BRIEF lodged by Movant-Amicus EEOC in support of appellee/cross-appellant Kolstad in 96-7047, 96-7030 Copies: 30. Certificate of service date 8/1/97.

* * *

8/15/97 REPLY BRIEF filed by American Dental Association in 96-7047, 96-7030. Copies: 30. (Certificate of mail service date 8/15/97).

8/19/97 PER CURIAM ORDER, In Banc, filed granting motion to allow amicus filed by EEOC; Clerk directed to file the lodged brief of the EEOC....

8/19/97 PER ABOVE ORDER lodged brief of amicus EEOC is filed.

8/21/97 DEFERRED JOINT APPENDIX filed by the American Dental Association and Carole Kolstad. Copies: 30. Certificate of service date 8/21/97.

* * *

9/12/97 LETTER filed by Appellant/Cross-Appellee Carole Kolstad pursuant to FRAP 28j advising of additional authorities. Certificate of service date 9/12/97 .

* * *

9/16/97 LETTER filed by Appellee/cross-appellant Amer Dent Assn in response to appellant's letter pursuant to FRAP 28j advising of additional authorities. Certificate of service date 9/15/97.

D.C. Circuit Court of Appeals
Docket #: 96-7030

9/22/97	ORAL ARGUMENT HELD before Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland.
10/28/97	TRANSCRIPT of oral argument held on 9/22/97. [183066-1] [96-7047, 96-7030] (wmw) [96-7030 96-7047]
5/8/98	JUDGMENT for the reasons in the accompanying opinion affirming [351246-1]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland . [96-7030, 96-7047] (mam) [96-7030 96-7047]
5/8/98	IN BANC OPINION (22 pgs) for the Court filed by Judge Williams, CONCURRING OPINION (1 pgs) filed by Judge Randolph, DISSENTING OPINION (18 pgs) filed by Judge Tatel, with whom Edwards, Wald, Rogers, Garland join [96-7030, 96-7047] (mam) [96-7030 96-7047]

* * *

5/27/98	MANDATE ISSUED to Clerk, District Court [354939-1] Awaiting rehearing petition cancelled. in 96-7030, in 96-7030, in 96-7047, in 96-7047.

* * *

Nos. 96-7030/7047 in the United States
Court of Appeals for the District of Columbia Circuit

* * *

No. 94-1578 in the United States District
Court for the District of Columbia in
which the following pleadings, exhibits,
and proceedings were filed, offered,
and conducted:

DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

***[PLAINTIFF'S] REQUEST NO. 1*:**

The document attached as Exhibit A is a true and accurate copy of the Consent Decree in *Resnick v. American Dental Association*, No. 79-C-3785 (N.D. Ill.), which was entered into by the American Dental Association and which became effective on or about July 6, 1984.

***[ADA'S] RESPONSE*:**

With the exception of the facsimile line appearing across the top portion of each page, Defendant admits the authenticity of the document attached as Exhibit A to Plaintiff's First Request for Admission.

[EXHIBIT A]

CONSENT DECREE

[IN *RESNICK v. AMERICAN DENTAL ASSOCIATION*]

* * *

C. *Career Development Planning Services.*

In order to promote the upward mobility of qualified women employees the ADA will take the following steps:

1. The ADA will develop a program of Career Development Planning Services. The purpose of this program will be to assist each interested employee in achieving the highest position commensurate with his or her skills, abilities and interests. A woman employee in the Department of Personnel will be designated to implement this program. This designated employee will be available to counsel employees on career development paths and potential opportunities for upward mobility at the ADA. Where appropriate, employees may be referred for management training or for other training opportunities that will broaden their employment potential at the ADA.

The person designated to implement this program will either be the same person as the EEO Officer, or will work in close contact with the EEO Officer (see Section VI below). In either event, a primary focus of her work will be to encourage the upward mobility of women.

The services of this program will be available to both non-exempt and exempt employees.

2. Information concerning the salary grades assigned to each ADA position and the salary ranges associated with each grade will be made available by the Personnel Department to any ADA employee upon request. ADA employees will also have the right, upon request, to review the current job description for any position at the ADA.

3. The ADA will continue its current policy of internal posting of all position vacancies prior to external advertisements or formal or informal recruitment. All persons involved in the process of selecting candidates to fill vacancies will be advised that pre-selection of a favored candidate is contrary to the ADA's firm policy of giving full and fair consideration to each application. Violations of this

policy will have an adverse impact on an employee's annual merit review and will be cause for discipline.

4. In filling any vacancy within a salary grade category where women hold fewer than 40% of the positions, a current woman employee will be given preference over equally qualified male candidates and over equally qualified external female candidates, including "Talent Bank applicants" (see Section D below).

* * *

[ADA Logo & Letterhead]

Supervisor's Review

Employee Information:

Name Carole Frings [Kolstad]

Title Federal Agency Representative

Division Government Relations

Department

Reports To:

Name Roy S. Bredder

Title Director, Washington Office

Date Prepared 10/20/89

Period Covered By This Appraisal From ____ To____

Performance Review Procedure:

1 Supervisor schedules a brief meeting with each employee to distribute his/her copy of the Performance Review Form. Review the five (5) to ten (10) goals or job responsibilities to be evaluated and set a date for the performance appraisal meeting.

2 Supervisor completes the Performance Appraisal Form and reviews performance rating with department or division head.

3 Supervisor and employee meet to discuss completed forms.

4 Completed, signed employee and supervisor performance appraisal forms are sent to Division Director for signature and then to the Human Resources Department.

Accomplishments

Has employee performed exceptionally well or accomplished more than what was expected? (Give specific examples of tasks or behaviors to illustrate performance accomplishments).

Excellent job on full range of OSHA and EPA matters, established good system for regulation comments, addressed Data Bank Issues.

Strengths

What do you think are your subordinate's major strengths? (Think of specific tasks or behaviors).

Well organized, thorough, cooperative, effective communication.

* * *

Employee's
Signature /s/Carole Frings [Kolstad] Date 10/23/89

Supervisor's Signature /s/Roy S. Bredder Date 10/23/89

Department Head
Approval /s/Roy S. Bredder Date 10/23/89

Division Head Approval Date

Human Resources Review Date

[ADA Logo & Letterhead]

Supervisor's Review

Employee Information:

Name Carole Frings [Kolstad]

Title Manager, Federal Agency Relations

Division Legislative Affairs

Department Washington Office

Reports To:

Name Leonard P. Wheat

Title Acting Director, Washington Office

Date Prepared October 29, 1990

Period Covered By This Appraisal From 11/89 To 11/90

Performance Review Procedure:

1 Supervisor schedules a brief meeting with each employee to distribute his/her copy of the Performance Review Form. Review the five (5) to ten (10) goals or job responsibilities to be evaluated and set a date for the performance appraisal meeting.

2 Supervisor completes the Performance Appraisal Form and reviews performance rating with department or division head.

3 Supervisor and employee meet to discuss completed forms.

4 Completed, signed employee and supervisor performance appraisal forms are sent to Division Director for signature and then to the Human Resources Department.

Accomplishments

Has employee performed exceptionally well or accomplished more than what was expected? (Give specific examples of tasks or behaviors to illustrate performance accomplishments).

Achieved three changes in OSHA proposed infection control rule; did good job of advocating ADA policy on Data Bank fee refunds; greatly increased number of visits with Federal Officials.

Strengths

What do you think are your subordinate's major strengths? (Think of specific tasks or behaviors).

Good analytical skills; thoroughness, ability to handle multiple tasks simultaneously, maintains good coordination with Chicago staff on Federal agency issues.

* * *

Employee's Signature /s/Carole Frings [Kolstad] Date 10/31/90

Supervisor's Signature Date 10/31/90

Department Head Approval /s/Leonard Wheat Date

Division Head Approval /s/ William Allen Date 11/1/90

Human Resources Review Date

Inter-Office
Memorandum

[ADA Logo and Letterhead]

Date: March 1, 1991

To: ALL EMPLOYEES

From: /s/ Mr. Thomas J. Dorsch

Subject: OPEN POSITIONS

EXEMPT POSITIONS—Professional, Executive, Managerial

Position: Legislative Counsel

Grade: 10 $957.70/wk (Minimum)

Department: Washington Office

Recruiter: Mr. Michael Salemme
Ext. 2575

JD/LLB degree and at least six years legal/legislative experience with regard to governmental affairs liaison and legislative advocacy functions, preferably including application to healthcare issues.

The Association is an affirmative action employer and therefore encourages the referral of women, minorities, handicapped and Vietnam Era Veterans. All Association employees are eligible to participate in the employee referral program. If you know someone who would qualify for a full-time position, other than a current part-time employee, refer him or her to the Human Resources Office. Should the individual be hired and complete three (3) months of service, you will receive in the amount of $100 from the Association at the completion of the three month period. A Supervisor

may not be eligible for the referral fee, however, if the employee referred is to work in his or her area.

If you are interested in any of these positions, please contact the recruiter responsible for the position. All applicants should be made in writing with a copy to your immediate supervisor. No outside recruitment interviews will be held for five (5) days following the initial posting of a position to allow time for any qualified Association employee to make application.

TJD/OCR:04

CAREER DEVELOPMENT

Equal Opportunity

It has been and is the policy of the American Dental Association to provide equal employment opportunity without regard to race, color, religion, age, sex, national origin, handicaps, ancestry, sexual orientation, marital status, parental status, military discharge status or source of income.

This policy applies to all phases of personnel recruiting and hiring activities: training, upgrading and promotional activities; administration of all wage and salary programs; benefit administration, as well as all Association-sponsored or supported employee activities; disciplinary actions, and any other personnel policies and practices which would have other discriminatory effects on any employees as set forth under public law.

Association employment decisions, including promotions or transfers, are based upon the qualifications of the candidate. Like all employers, the Association seeks employees who are able and eager to assume increasing levels of responsibility.

Position Posting

Recognizing that ADA staff members represent an important pool of potentially qualified applicants, and recognizing also the need and responsibility of the Association to provide promotional opportunities to qualified staff, all position openings are posted internally through inter-office memoranda to all employees.

The position posting system allows qualified Association staff members to apply for open positions before outside recruitment begins. Each ADA employee applying for a new position must have at least six (6) months experience in his or

her current ADA position. The posting provides information about the position including educational and experience requirements, salary grade, and minimum salary, to allow staff members to make informed choices about their career options.

To apply for any posted position, employees should notify the Human Resources Department, in writing, of their interest in the position. A copy of that notification should be sent to the employee's supervisor. All available positions are updated monthly in a notice from the Human Resources Department. In addition, staff members who are interested in transferring to another department should discuss this prospect with their supervisors or a member of the Human Resources Department.

* * *

[ADA Logo & Letterhead]

Supervisor's Review

Employee Information:

Name Carole Kolstad

Title Director, Fed. Agency Relations

Division Legislative Affairs

Department Washington Office

Reports To:

Name Dr. Bill B. Lefler

Title Director, Washington Office

Date Prepared 10/23/91

Period Covered By This Appraisal From 10/90 To 10/91

Performance Review Procedure:

1 Supervisor schedules a brief meeting with each employee to distribute his/her copy of the Performance Review Form. Review the five (5) to ten (10) goals or job responsibilities to be evaluated and set a date for the performance appraisal meeting.

2 Supervisor completes the Performance Appraisal Form and reviews performance rating with department or division head.

3 Supervisor and employee meet to discuss completed forms.

4 Completed, signed employee and supervisor performance appraisal forms are sent to Division Director for signature and then to the Human Resources Department.

Accomplishments

Has employee performed exceptionally well or accomplished more than what was expected? (Give specific examples of tasks or behaviors to illustrate performance accomplishments).

Successfully promoted ADA federal agency policy through various meetings research (see attached)

Strengths

What do you think are your subordinate's major strengths? (Think of specific tasks or behaviors).

Research, Data Consolidation and Communication skills (oral & written)

* * *

Employee's Signature/s/ Carole Kolstad	Date 10/28/91
Supervisor's Signature	Date
Department Head Approval	Date
Division Head Approval/s/ Bill B. Lefler, DDS	Date 10/28/91
Human Resources Review	Date

[ADA Logo & Letterhead]

Supervisor's Review

Employee Information:

Name Carole Kolstad

Title Director, Federal Agency Relations

Division Legislative Affairs

Department Federal Agency Relations

Reports To:

Name Leonard P. Wheat

Title Director, Government Relations

Date Prepared 11/9/92

Period Covered By This Appraisal From 11/91 To 11/92

Performance Review Procedure:

1 Supervisor schedules a brief meeting with each employee to distribute his/her copy of the Performance Review Form. Review the five (5) to ten (10) goals or job responsibilities to be evaluated and set a date for the performance appraisal meeting.

2 Supervisor completes the Performance Appraisal Form and reviews performance rating with department or division head.

3 Supervisor and employee meet to discuss completed forms.

4 Completed, signed employee and supervisor performance appraisal forms are sent to Division Director for signature and then to the Human Resources Department.

Accomplishments

Has employee performed exceptionally well or accomplished more than what was expected? (Give specific examples of tasks or behaviors to illustrate performance accomplishments).

(1) Successfully advanced Association recommended changes in OSHA bloodborne pathogens standard and inspection procedures; (2) provided continuing substantive liaison w/ HHS National Practioner Data Bank & related program

Strengths

What do you think are your subordinate's major strengths? (Think of specific tasks or behaviors).

(1) Thorough knowledge of federal regulatory process; (2) ability to identify analyze and communicate complex government rules and policies; and (3) Disciplined work-habits with attention to detail.

* * *

Employee's Signature/s/ ***Carole Kolstad**** ***Date 11/17/92****

Supervisor's Signature Date

Department Head
Approval /s/ ***Leonard Wheat**** Date

Division Head
Approval/s/ ***William Allen**** Date ***11/19/92****

Human Resources Review Date

* Handwritten material

[ADA Logo & Letterhead]

Supervisor's Review

Employee Information:

Name Thomas Spangler

Title Legislative Counsel

Division Legislative Affairs

Department Congressional Relations

Reports To:

Name Leonard P. Wheat

Title Dir., Gov. Relations; Asst. Director

Date Prepared 10/14/92

Period Covered By This Appraisal From 10/90 To 10/91

Performance Review Procedure:

1 Supervisor schedules a brief meeting with each employee to distribute his/her copy of the Performance Review Form. Review the five (5) to ten (10) goals or job responsibilities to be evaluated and set a date for the performance appraisal meeting.

2 Supervisor completes the Performance Appraisal Form and reviews performance rating with department or division head.

3 Supervisor and employee meet to discuss completed forms.

4 Completed, signed employee and supervisor performance appraisal forms are sent to Division Director for signature and then to the Human Resources Department.

Accomplishments

Has employee performed exceptionally well or accomplished more than what was expected? (Give specific examples of tasks or behaviors to illustrate performance accomplishments).

Developed Association position papers on broad range of critical legislative and regulatory issues with skill and professionalism.

Strengths

What do you think are your subordinate's major strengths? (Think of specific tasks or behaviors).

(1) Ability to perform tasks with minimal supervision, (2) excellent analytical skills, (3) liaison with members of Congress and key staff, (4) willingness to assume multiple responsibilities.

Support of Affirmative Action

If subordinate is responsible for hiring, indicate number of new hires in the area this year.

Number of New Hires ____ Comments: _____

Management of Division, Department, Programs, etc.

[This Exhibit Continues on Next Page]

Check the appropriate place on the scale. Document with actual incidents under "comments" for performance above or below "Meets Job Standards".

	Meets Job Standards Below — Above	Comments
Controlling Department or Program Expenses		
Planing		
Organizing		
Communications		
Supervisory Skills		
Promoting Team Work		

Performance Level Definitions		
List the principal goals/objectives previously established. If additional space is needed, please add additional page.	5 Exceptional	Performance substantially exceeds requirements in all areas.
Place weight (%) for each goal by adding the appropriate number.	4 Distinguished	Performance exceeds position requirements in several areas.
Rate the performance level for each goal by adding the appropriate numbers.	3 Competent	Performance fully meets position requirements
Multiply weight of goal (%) by performance level.	2 Marginal	Performance is below competence level in several areas.
	1 Unacceptable	Performance warrants immediate probation status.

[This Exhibit Continues on Next Page]

Principal Goals/Objectives	Evidence For Rating	Weight %	Points
1 Advance Association's Legislative agenda	Congressional consideration of usual and customary issues in ERISA, tax issues, military dependent care and Bloodborne Pathogen Standard	35	5 **4** 3 2 1 = 1.40
2 Increase national visibility of Association	Active in coalitions involving health care, tax equity, tort reform and managed care	20	5 **4** 3 2 1 = .80
3 Establish Washington Office liaison with new members of Congress	Attended numerous fundraisers and other other functions and worked with members of Congress and staff on ADA issues	20	5 **4** 3 2 1 = .80
4 Provide Association with information crucial to policy development	Instrumental in developing position papers in response to OSHA's objections concerning the Bloodborne Pathogen Standard	5	5 **4** 3 2 1 = .20
5 Articulate Association position with Executive branch personnel handling ADA regulatory issues	Helped influence DOD personnel regarding expansion of military dependant dental program resulting in significant expansion effective April 1993	20	5 **4** 3 2 1 = .80
6			54321 = .
7			54321 = .
8			54321 = .
9			54321 = .
10			54321 = .
Overall Performance Level	Total Weight	100%	Total Points 4 .00

JA-34

JA-35

Scoring Form Instructions
1. Multiply weight of goal (%) by performance level
2. Add Points = Total Points

[This Exhibit Continues on Next Page]

Performance Improvement

Describe any performance area which needs improvement. (Think of specific tasks or behaviors).

Employee has demonstrated ability to perform all tasks assigned with skill and thoroughness.

Comment on the support or help you will provide the employee to improve performance.

Employee's Comments on the Review — Please include any specific areas of agreement or disagreements with this performance review.

Supervisor's Comments on the Review

Tom is another "Bright" Star - opportunity for promotion represents ADA exceptionally*.

The signature only verifies that the supervisor and employee have met and discussed the performance appraisal form.

Employee's Signature /s/ ***Thomas Spangler****	Date ***Nov. 17, 1992****
Supervisor's Signature	Date
Department Head Approval /s/ ***Leonard Wheat****	Date ***11/17/92****
Division Head Approval/s/ ***Wm. Allen****	Date ***11/19/92****
Human Resources Review	Date

* Handwritten material.

[ADA Logo & Letterhead]

Position Descriptive Questionnaire

Position Title Director, Legislation & Legislative Policy Secretary, Council on Governmental Affairs & Federal Dental Services

Name of Incumbent

Division Legislative Affairs

Department Washington Office

Position Reports To

Title Director, Washington Office

Name

Preparation Date July 18, 1988

Introduction

Part I is designed to describe the major duties and responsibilities of the position. Part II is to be completed by the supervisor. If additional space is needed for any section, please label the page clearly and attach the information to the Questionnaire.

Dr. Allen used to rewrite Jack's description*

[This Exhibit Continues on Next Page]

* Handwritten material

Part I. Description of Position

In one or two sentences, define the main purpose/responsibility of your position.

The purpose is to provide ADA staff and outside entities, including the Congress, with analysis of ADA policy and legislative proposals. The main responsibility is to evaluate current and anticipated legislation and regulations in relation to Association policy. Management responsibilities for the programs on the Council on Federal Dental Services

Description of Functions

List the Major Functions of this position (approximately 5 to 10) which describe only the Major Activities for which this position is held accountable (plan, control, investigate, analyze) in order of importance. DO NOT list all individual tasks or steps which must be performed to accomplish the function. For each function state in four separate sections (a) approximate percent of time performing function; (b) "What is done" (action); (c) "How it is done" (method); and (d) "why is it done" (result). Use the printed example as a guideline.

[This Exhibit Continues on Next Page]

%	What is Done	How it is Done	Why is it Done
60	Order all supplies and equipment for Association	Purchase requests are submitted by Departments; I contact vendors submit orders	To ensure that all Departments have adequate supplies to provide necessary services
	A.* Analyze Federal health legislation & regulations	Bills & regulations are reviewed for content & relation to ADA policy	To prepare basis for Association legislative & regulatory activity
	B.* Evaluate Association policies	Policies are reviewed for appropriateness, issues are reviewed to determine if additional policies are needed	To assure ADA responsiveness to legislative/ regulatory issues

* Handwritten material

[This Exhibit Continues on Next Page]

%	What is Done	How it is Done	Why it is Done
1.*	Develop position papers on aspects of dentistry as they relate to public policy	Major issues are identified & thoroughly reviewed in context of ADA policies	Provides source of information for ADA Board of Trustees, Councils, staff and congressional and agency officials
2.*	Coordinate legislative & regulatory activities and information needs between Chicago and Washington offices	Issues are reviewed with appropriate staff - information needs are identified and met	To provide best information possible to Congress, federal agencies and others
*Oversee** 3.	*Preparation of** Congressional testimony & comments on proposed regulations	Issues are researched & statements prepared	To provide public statements of ADA concerns legislation and regulations
4.*	Interact with *Congress** ~~*sional committee staff*~~ and representatives of other organizations on *legislation** *policy*	*Lobbying,** Meetings, seminars, other contacts	*To advocate ADA positions before Congress and** To provide information about ADA concerns
5.*	Provide for management and administrative services necessary for activities of the council		

* * *

*Handwritten material

[ADA Logo & Letterhead]

Position Descriptive Questionnaire

Position Title Legislative Counsel

Secretary, Council on Governmental Affairs & Federal Dental Services

Name of Incumbent

Division Legislative Affairs

Department Washington Office

Position Reports To

Title Assistant Director, Washington Office

Name Leonard P. Wheat

Preparation Date February 19, 1991

Introduction

Part I is designed to describe the major duties and responsibilities of the position. Part II is to be completed by the supervisor. If additional space is needed for any section, please label the page clearly and attach the information to the Questionnaire.

Part I. Description of Position

In one or two sentences, define the main purpose/responsibility of your position.

To provide counsel to the Director and Assistant Director on the legislative activities of the Washington Office.

Description of Functions

List the Major Functions of this position (approximately 5 to 10) which describe only the Major Activities for which this position is held accountable (plan, control, investigate, analyze) in order of importance. DO NOT list all individual tasks or steps which must be performed to accomplish the function. For each function state in four separate sections (a) approximate percent of time performing function; (b) "What is done" (action); (c) "How it is done" (method); and (d) "why is it done" (result). Use the printed example as a guideline.

[This Exhibit Continues on Next Page]

%	What is Done	How it is Done	Why is it Done
60	Order all supplies and equipment for Association	Purchase requests are submitted by Departments; I contact vendors submit orders	To ensure that all Departments have adequate supplies to provide necessary services
25%	Coordinates the development and presentation of Association policies to Congress	Through discussions and meetings between the Divisions of Legislative Policy and Congressional Relations	To ensure accurate and effective communications to members of Congress and key staff
20%	Provides liaison for the Washington Office with the Division of Legal Affairs in the analysis of legislation and its impact upon the Association and the profession	Personal contact, meetings and other communications	To ensure coordination in the flow and interpretation of Congressional bills and legislative actions affecting dentistry

add to A. •

add to B. •

• Handwritten material

%	What is Done	How it is Done	Why it is Done
45%	Represents the Association in legislative discussions with Congress, Congressional staf [sic] and national health, labor and business organizations	Personal contacts, attendance at meetings, monitoring of Congressional hearings	To promote and advance the legislative objectives of the Association
10%	Serves as liaison with legislative Counsels (or equivalent) of Washington Office health, labor and business organizations	Personal contact	To develop coalition advocating Association legislative positions

Substitute for X 4. •

• • •

*Handwritten material

SALARY GRADE CATEGORIES 9 - 14
as of 11/20/92

GRADE 14		GRADE 13		GRADE 12	
F	Director State Govt Affairs	M	Director Council on Insurance	M	Director Bureau of Economic & Behavioral Research
M	Assistant Director Washington Office	F	Director Testing Services	F	Director Council on Dental Care Programs
		M	Director Legislation & Legislative Policy/ Director Council on Govt Affairs & Federal Dental Service	M	Director Council on Dental Practice

GRADE 13		GRADE 12	
M	Director Human Resources	M	Director Community Health, Hospital & Medical Affairs
M	Director Dental Therapeutics	M	Director Membership Records
M	Director Paffenbarger Research Center	M	Director Data Processing
		F	Director Internal Audit
		M	Associate Director Paffenbarger Research Center

Appendix A

[This Exhibit Continues on Next Page]

GRADE 11		GRADE 10		GRADE 9	
M	Executive Editor	F	Director Operations	F	Manager Purchaser Information
F	Director Conference Services & Meeting/Planning	M	Director Council on Annual Session & International Relations	F	Manager Access & Community Affairs
F	Director Media & Audio Visual Services	M	Director Professional Communications	F	Manager Fluoridation & Prevention
F	Director Public Information &Education	F	Director Survey Operations	M	Director Career Guidance

GRADE 11		GRADE 10		GRADE 9	
M	Director Salable Materials	M	Assistant Director Community Health, Hospital & Medical Affairs	M	Director Educational Surveys
M	Director Informatics	F	Director Council on Young Professional	M	Manager Standards & Evaluation
M	Assistant Director Dental Accreditation	F	Director Dental Society Services	M	Manager Test Administration
M	Manager Public Information	F	Director Member Development Services	F	Manager Test Development
M	Associate Director Dental Materials, Instruments & Equipment	F	Assistant Director Auxiliaries	M	Manager Budgets

[This Exhibit Continues on Next Page]

GRADE 11		GRADE 10		GRADE 9	
M	Assistant Director Paffenbarger Research Center	F	Assistant Director Advanced Education	F	Manager Accounting
M	Chief Research Scientist	F	Risk Manager	M	Assistant Director Technology
M	Chief Research Scientist	M	Director Political Action Committee	M	Assistant Director Programming
M	Director Research Institute Chemistry	F	Director Federal Agencies	F	Staff Attorney
M	Director Research Institute Toxicology	F	Manager Benefits	M	Manager Political Education

GRADE 10		GRADE 9	
F	Director Administrative Affairs	M	Manager State Legislation
M	Assistant Director Dental Therapeutics	M	Manager Training
M	Assistant Director Dental Therapeutics	M	Project Leader
F	Research Associate I	M	Project Leader
		M	Project Leader
		M	Project Leader
		M	Project Leader
		F	Project Leader

Inter-Office
Memorandum

[ADA Logo and Letterhead]

Date: November 20, 1992

To: Dr. Bill Allen

From: Carole Kolstad /s/ Carole Kolstad

Subject: Position of Director of the Councils on Governmental Affairs and Federal Dental Services

Bill, I wanted to let you know that I am interested in being considered for Jack's position as Director of the Council. I told Skip of my interest in the position on October 30 (after three weeks of asking for an appointment with him). He told me he would discuss it with you when you came to Washington on November 16 and 17 and that you and he would make the decision soon thereafter. However, yesterday when I inquired he said that he did *not* discuss this with you when you were here this week, and that he would call you yesterday about this. Today he told me that you did not have time to discuss this when he spoke with you yesterday on the phone. I did try to call you today but was told you are out of the office until November 30.

I know that Skip has been considering putting Tom Spangler in the position and has discussed it with him. I do not know if any promises have been made to Tom. Skip seemed surprised when I expressed an interest in Jack's position, and said he did not know I had any interest in the job.

I am serious about applying for the position and would like the opportunity to discuss this with you. Would it be possible for you to discuss it with me when you are here on December

1 and 2? I'd be happy to come in for an early breakfast or stay late if that is necessary. Thanks a lot.

Ck:dm

From: Gaymer, Joy J. x2572 (GAYMERJ)
To: EVERYONE
Date: Friday, November 20, 1992 3:30 pm
Subject: OPEN POSITIONS

Please communicate the following positions to your colleagues who do not have E-mail.

Thank You!

Files: a:posting.34

DATE: November 20, 1992

TO: ALL EMPLOYEES

FROM: Mr. Thomas J. Dorsch

SUBJECT: **OPEN POSITIONS**

EXEMPT POSITIONS--Professional, Executive, Managerial

* * *

POSITION: Director, Legislation & Legislative Policy;
Director, CGAFDS

GRADE: 13 $1,323.08/wk(Min)

DEPARTMENT: Washington Office;
Council on Government Affairs & Federal Dental Services

RECRUITER: M. Salemme
Ext. 2575

JD or LLB degree and at least 10 years experience in legislative advocacy/governmental affairs including a minimum of 3 years related experience with the Federal government, preferably as a Congressional staff member, or

with an association or as a legal/legislative representative for a political party; solid knowledge of the Federal system and legislative/regulatory process; strong oral/written communications skills.

Association is an affirmative action employer and therefore encourages the referral of women, minorities, disabled and Vietnam Era Veterans. All Association employees are eligible to participate in the employee referral program. If you know someone who would qualify for a full-time position, other than a current part-time employee, refer him or her to the Human Resources Office. Should the individual be hired and complete three (3) months of service, you will receive a check in the amount of $100 from the Association at the completion of the three month period. A supervisor may not be eligible for the referral fee, however, if the employee referred is to work in his or her area.

If you are interested in any of these positions, please contact the recruiter responsible for the position. All applications should be made in writing with a copy to you immediate supervisor. No outside recruitment interviews will be held for five (5) days following the initial posting of a position to allow time for any qualified Association employee to make application.

TJD/jjg:34

Inter-Office
Memorandum

[ADA Logo and Letterhead]

Date: November 23, 1992

To: Mike Salemme, Human Resources

From: Carole Kolstad /s/ Carole Kolstad

Subject: Application for Position of Director, Legislation and Legislative Policy; and Director, Council on Governmental Affairs and Federal Dental Services

This is to notify you that I am hereby applying for the above-named position. Enclosed is an updated resume from that submitted to the ADA in 1988. Please let me know if you would like me to provide you with any additional information.

Ck:dm

cc: Dr. Bill Allen
Mr. Skip Wheat

CAROLE L. KOLSTAD
7404 CHURCHILL ROAD
MCLEAN, VA 22101
HOME: (703) 790-5932
WORK: (202) 898-2400

OBJECTIVE Position, Director of Legislation and Legislative Policy; and Director, Council on Governmental Affairs and Federal Dental Services

SUMMARY OF QUALIFICATIONS

GOVERNMENT RELATIONS

Currently the Director of Federal Agency Relations for the American Dental Association. Expertise in OSHA, medical waste, the National Practitioner Data Bank, the Americans with Disabilities Act, and many other areas. My legislative experience includes six years at the Defense Department, where I drafted all of the legislation for the Department of Defense (DoD), reviewed and analyzed legislation affecting DoD, prepared Congressional testimony and accompanied Presidential appointees as their staff Counsel when they testified before Congress. In addition, I was often asked by Congressional committee staff to go to their offices and brief them on various DoD-related bills.

In my present position I have four year of experience in working directly with the Council on Governmental Affairs and Federal Dental Services, both in presenting briefings to the Council as well as being the assigned staff person for one of their committees, up until 1992 (when the Council dropped the committee format). I was also the staff person who accompanied the Council on their Indian Health Service site visit to Oregon in July 1991.

COMMUNICATIONS

Frequently requested to appear as a public speaker before audiences of up to one thousand. Have also appeared on national television programs on issues facing the dental profession.

LEGAL ABILITIES

My sixteen years of experience as an attorney include six years as a legislative attorney for the Defense Department, two years in other federal agencies, four in private practice, and four at the ADA. Have experience in administrative law, litigation, and a wide variety of legal issues, including corporate law, real estate transactions, and wills and estates.

WORK EXPERIENCE

- Director, Federal Agency Relations, American Dental Association, 1988 to present.
  - Responsible for initiating and conducting meetings with senior federal officials on issues of importance to the Association.
  - Organize lobbying campaigns by state and local dental societies on national regulatory issues, and organize the federal regulatory agenda.

    Supervise the Association's response to proposed federal regulations.
  - Provide information to Association members and state dental societies on federal regulations affecting dentistry.
  - Prepare written comments and testimony on federal regulatory issues.

  - Assist the Council on Governmental Affairs and Federal Dental Services in their policy-making role on federal agency issues.
- Solo private practice, Great Falls, Virginia, general law, 1985-1988.
- Associate, Robert E. Shoun, P.C. 10521 Judicial Drive, Suite 200, Fairfax, Virginia, 22030. Divorce and Family Law 1984-1985.
- Special Assistant (GS-15) to the Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development (HUD), 1980.
- Consultant, serving as a member of a hearing board, Nuclear Regulatory Commission (GS-15) 1978-1979.
- Attorney-Advisor (GS-15), Office of the General Counsel, Office of the Secretary of Defense (OSD), Department of Defense, 1971-1977.
  - First female attorney ever hired at the Defense Department.

BAR ADMISSIONS

Texas Bar - Texas Supreme Court, 1970
District of Columbia Court of Appeals, District of Columbia Bar, 1974
Supreme Court of Virginia, 1980

PROFESSIONAL ASSOCIATIONS

Virginia Bar Association
D.C. Bar Association
National Health Lawyers Association
Women in Government Relations
Business and Professional Women

EDUCATION

University of Illinois, Champaign, Illinois (B.A.), 1967
University of Texas School of Law, Austin, Texas (J.D.), 1970

PERSONAL

Married, two children, excellent health
Former President, Great Falls Business and Professional Women (1989-1990)
Interests - playing piano, hiking, theater, music, travel

REFERENCES AVAILABLE UPON REQUEST

[ADA Logo & Letterhead]

FAX COVER SHEET	SPECIAL INSTRUCTIONS:
Date: 11/24/92	COPY TO:
Time: 3:45	☐ Confidential
No. of Pages: 9 (including cover sheet)	☐ Urgent
TO: Mr. Skip Wheat	☒ For you information
Fax#:	☐ Per your request
FROM: Mike Salemme	**MESSAGE:**
Dept: Human Resources	Skip, for your records. Please make it available to Carol Kolstad *for review*. Thanx.
Fax#: (312) 440-7494	
If not received correctly, please call:	
(312) 440-2572	

FROM 312-440-7494 11-24-92 04:48 PM P01

[ADA Logo & Letterhead]

Position Descriptive Questionnaire

Position Title	Director, Legislation & Legislative Policy Director, Council on Governmental Affairs & Federal Dental Services
Name of Incumbent	
Division	Legislative Affairs
Department	Washington Office

Position Reports To

Title	Director, Washington Office
Name	
Preparation Date	November 17, 1992

Introduction

Part I is designed to describe the major duties and responsibilities of the position. Part II is to be completed by the supervisor. If additional space is needed for any section, please label the page clearly and attach the information to the Questionnaire.

Part I. Description of Position

In one or two sentences, define the main purpose/responsibility of your position.

The purpose is to provide ADA staff and outside entities, including the Congress, with analysis of ADA policy and legislative proposals. The main responsibility is to evaluate current and anticipated legislation and regulations in relation to Association policy. Management responsibilities for the programs on the Council on Federal Dental Services

Description of Functions

List the Major Functions of this position (approximately 5 to 10) which describe only the Major Activities for which this position is held accountable (plan, control, investigate, analyze) in order of importance. DO NOT list all individual tasks or steps which must be performed to accomplish the function. For each function state in four separate sections (a) approximate percent of time performing function; (b) "What is done" (action); (c) "How it is done" (method); and (d) "why is it done" (result). Use the printed example as a guideline.

[This Exhibit Continues on Next Page]

%	What is Done	How it is Done	Why is it Done
60	Order all supplies and equipment for Association	Purchase requests are submitted by Departments; I contact vendors submit orders	To ensure that all Departments have adequate supplies to provide necessary services
	Analyze Federal health legislation & regulations Coordinates the development and presentation of Association policies to Congress	Bills & regulations are reviewed for content & relation to ADA policy Through discussions and meetings between the Divisions of Legislative Policy and Congressional Relations	To prepare basis for Association legislative & regulatory activity To ensure accurate and effective communications to members of Congress and key staff
	Evaluate Association policies Provide liason for the Washington Office with the Division of Legal Affairs in the analysis of legislation and its impact upon the Association and the profession	Policies are reviewed For appropriateness, issues are reviewed to determine if additional policies are needed Personal contact, meetings and other communications	To assure ADA responsiveness to legislative regulatory issues To ensure coordination in the flow and interpretation of Congressional bills and legislative actions affecting dentistry

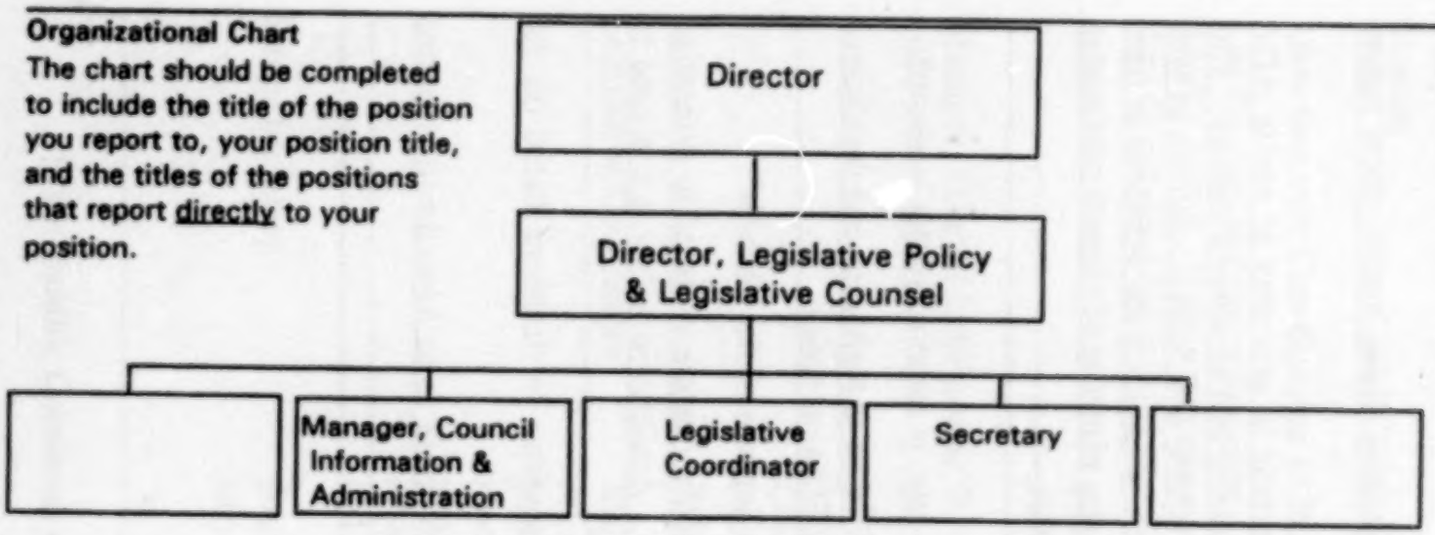
%	What is Done	How it is Done	Why it is Done
	Develop position papers on aspects of dentistry as they relate to public policy	Major issues are identified & thoroughly reviewed in context of ADA policies	Provides source of information for ADA Board of Trustees, Councils, staff and congressional and agency officials
	Coordinate legislative & regulatory activities and information needs between Chicago and Washington offices	Issues are reviewed with appropriate staff - information needs are identified and met	To provide best information possible to Congress, federal agencies and others
	Oversee preparation of Congressional testimony & comments on proposed regulations	Issues are researched & statements prepared	To provide public statements of ADA concerning legislation and regulation

[This Exhibit Continues on Next Page]

___	Represents the Association in legislative discussions with Congress, Congressional staff and national health, labor and business organizations	Personal contacts, attendance at meetings, monitoring of Congressional hearings	To promote and advance the legislative objectives of the Association
___	Provide for management and administrative services necessary for activities of the council		
___			

Organizational Chart

The chart should be completed to include the title of the position you report to, your position title, and the titles of the positions that report directly to your position.



[This Exhibit Continues on Next Page]

Planning

Describe the kind of planning (long and/or short range) required of this position.

Long and short term planning is necessary to assure ADA readiness to address legislative and regulation matters. This is based on input from Congress and federal agencies as well as ADA staff. Planning and organizing the workload to meet schedules is needed. Includes planning of council substantive evaluation of policy issues.

Analysis

What kind of analysis, if any, is required in this position?

Extensive analysis of provisions of legislation and regulations and responsiveness of Association policy.

What is analyzed and the purpose of the analysis?

Federal legislation and regulations are analyzed to determine their impact on dentistry. Association policy is analyzed to assure its appropriateness.

Do you make recommendations or decisions based on the analysis?

Yes, recommendations are made as to Association positions and policy changes.

PDQ
Exempt

Direction and Coordination of People

List the titles and major functions of those positions reporting directly to you. (if your subordinates perform identical tasks, they do not need to be listed separately).

Title	Function/Major Responsibilities
Manager, Council Information and Administration	To provide Council analysis of current legislation with proposals for Council involvement; to advise Council on formation of legislation to advance Association objectives
Legislative Coordinator	Maintenance and update of reference library to contain pertinent bills, committee reports, laws and regulations and other documents of the legislative and executive branch
Senior Secretary	Secretarial and administrative duties

* * *

[This Exhibit Continues on Next Page]

Direction and Coordination of People Continued

In directly supervising those who report to you, check the appropriate boxes for the following supervisory functions:

	Direct Authority	Shared Authority	Little or No Authority
Evaluate Performance	☒	☐	☐
Recommend of grant increases	☒	☐	☐
Hire	☒	☐	☐
Terminate	☒	☐	☐
Set work performance standards	☒	☐	☐
Discipline	☒	☐	☐
Establish and maintain work schedules	☒	☐	☐

External Relationships

Indicate the groups, organizations, or agencies outside the Association with which you maintain contact in the performance of position responsibilities.

Type of Group of Organization	Position Title of Contact	Purpose of Contact	Frequency per Week
Congression Comm.	staff members	legis. information	5-10
Other Health Related Organizations	professional	Coordination of Strategy	5-10
Congressional staffs	legis. directors	legis. information	5-10
Federal agencies	bureau heads & above	Regulation info.	5-10

Briefly describe the external relationships of this position as they affect the services, image, or reputation of the Association.

External relationships of this position are of critical importance in developing the background for effective ADA legislative positions and proper communication of Association positions to Congress, federal agencies and other organizations. Relationships with legal/legislative communities of interest.

[This Exhibit Continues on Next Page]

Administration and Control of Costs

(note: Complete this item ONLY if it is *clearly* applicable and if the figures are readily available).

Do you prepare and have responsibility for a distinct operating budget?

Yes ☒ No ☐

If so, what is the dollar amount of the current operating budget for which this position is responsible?

$ _____

Does the above figure include salaries?

Yes ☒ No ☐

If so, how much? $ _____

Innovation

What are the requirements of this position for original thinking-the application of new ideas, significant departures from established patterns, or solving complex problems?

The ability or [sic] perceive the full ramifications of issues and to develop innovation solutions through alternative approaches to legislative and regulatory problems is vital if the ADA is to achieve its goals.

Internal Contacts

Indicate the departments inside the Association with which contact is maintained in the performance of position responsibility.

Department	Position Contact	Purpose of Contact	Frequency Per Week
Dental Care	AED & Council Secretary	information exchange	3-5
Dental Health	AED & Council Secretary	" " "	"
Dental Education	" " "	" " "	"
Dental Practice	" " "	" " "	"
Insurance	" " "	" " "	"
Legal	AED Legal & Assoc. Counsels	" " "	"

Knowledge and Background Requirements

List below the minimum requirements of knowledge and previous experience necessary for an individual to be considered for this position.

Minimum Knowledge

College Degree, practical knowledge of Association activities, strong writing skills, Law degree

List below additional characteristics that are desirable, but not essential, for an individual to start this position.

Kind of Length of Experience:

10 years experience with legislative body or policy position in an Association

[This Exhibit Continues on Next Page]

Desirable, But Not Essential

Participation in development of legislative policies and strategies relationship with other organizations in addressing common issues.

Please list other positions within the organization that are similar to this position.

None

Incumbent's Signature **Date:**

Immediate Supervisor's Signature **Title:** **Date:**

Personnel Department Review **Date:**

What knowledge and skills do you consider to be most critical for this position?

Personal relation skills.

Complete knowledge of regulatory process.

Ability to analyze regulations and suggest improvements.

Dedication to constant monitoring.

Bachelors degree. Law degree

Comment on the accuracy and completeness of the statements by employees. Add any items that are missing and/or will make the Questionnaire more complete.

As staff assignments are re-evaluated, I believe this position will be required to assume some management responsibilities in terms of assignments of Washington staff.

Supervisor Signature: Date:

Division Head: Date:

Important: Significant differences between the supervisor's view of the position and the employee's view should be discussed and resolved prior to submittal of the Questionnaire to Human Resources Department.

Part II. Supervisory Section

This section is to be filled out by the incumbent's immediate supervisor. Comments may also be added by higher level managers.

What do you consider the most important responsibility of this position?

Maintain liaison with Congress, federal agencies, bureaus and the Administration. Liaison with Legal Division ADA-Chicago

* * *

What are the other duties you consider important to this position?

1. Personal contact with agency and bureau department heads.
2. Frequent visits with White House staff in health arena.
3. Knowledge of federal regulations and regulatory process.
4. Ability to analyze and interpret legislation and regulations.
5. Liaison with Chiefs of military dental services, Public Health and Veterans Administration.
6. Liaison with other health care groups.
7. Serve as Council Director

[This Exhibit Continues on Next Page]

What do you consider to be the minimum training and experience for a person to enter this position?

Knowledge of Federal system - legislative regulatory process Employment in Federal Government. Congressional staff or three to five years with another Association or legal/legislative representative for Political Party. Legal Background sufficient to interpret legislation.

November 25, 1992

Mr. Michael A. Salemme
Human Resources Department
American Dental Association
211 E. Chicago Ave.
Chicago, Ill. 60611

Dear Mr. Salemme:

Please accept this letter as my formal application for the position of "Director, Legislation & Legislative Policy; Director, CGAFDS", as described in the November 20, 1992 notice to all employees from Mr. Thomas J. Dorsch of your department.

I am faxing this document to you today, November 25, 1992, in an effort to ensure your timely consideration of my submission.

Sincerely,

/s/ Thomas J. Spangler, Jr.
Thomas J. Spangler, Jr.
Legislative Counsel
ADA

cc: Mr. Leonard P. Wheat

THOMAS J. SPANGLER, JR.
9125 Tulip Grove Road
Gaithersburg, Maryland 20879
(301) 926-2323 Home
(202) 785-4411 Business

OBJECTIVE — Government relations position.

QUALIFICATIONS SUMMARY — Five years as a lobbyist for the National Treasury Employees Union, with experience concerning issues before the Committee on Ways and Means; Committee on Finance; Committee on Energy and Commerce; House and Senate Committees on Appropriation; Committee on Post Office and Civil Service; and the Committee on Governmental Affairs. More specifically, I have

- Lobbied on issues concerning appropriations, authorizations and oversight of federal agencies.
- Worked extensively with regulatory agencies and interpreted rules and regulations.
- Written testimony for Congressional hearings.
- Testified before Congress.
- Trained NTEU members on grassroots activities.

- Spoken before outside organizations.
- Litigated before the U.S. Court of Appeals and the U.S. District Court, District of Columbia Circuit.

EMPLOYMENT HISTORY

LEGISLATIVE LIAISON (February 1986 to Present)

Employed by the National Treasury Employees Union, Washington, D.C. Work with members of the U.S. Congress and their staffs in an effort to address the interests of NTEU"s membership. Responsible, in part, for developing and implementing NTEU's legislative program, which involves cultivating working relationships with members of Congress and their staffs, testifying before Congressional committees, writing testimony for congressional hearings and developing working alliances with others having interests similar to NTEU's.

Responsibilities as an attorney have included representing NTEU before the U.S. Court of Appeals, and U.S. District Court, District of Columbia Circuit and researching and writing legal memos on topics under consideration for legal action.

ASSISTANT COUNSEL FOR NEGOTIATIONS (February 1982 to February 1986)
Employed by the National Treasury Employees Union, Washington, D.C. Duties consisted of serving as chief spokesperson for bargaining units in contract negotiations and in sessions before the Federal Mediation and Conciliation Service and the Federal Service Impasses Panel. Served as an advocate in arbitrations and in hearings before the Merit Systems Protection Board and represented NTEU before the Federal Labor Relations Authority.

LABOR RELATIONS CONSULTANT (March 1981 to February 1982)
Employed by the Michigan Association of School Boards, Lansing, Michigan. Duties consisted of serving as chief spokesperson for school boards in contract negotiations.

MEDIATOR FOR THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (May 1988 to Present)
Currently serve, pro bono,, as a mediator in the Multi-Door Dispute Resolution Program for the Superior Court of the District of Columbia. The program offers mediation as an alternative to litigation as a means of resolving domestic relations cases.

CREDENTIALS	Member of the District of Columbia Bar since June 1983. Admitted to practice before the U.S. Court of Appeals, District of Columbia Circuit.
EDUCATION	*MASTER OF LABOR AND INDUSTRIAL RELATIONS* Michigan State University (East Lansing, Michigan), December 1980 *JURIS DOCTORATE* The University of Toledo, College of Law (Toledo, Ohio), June 1979 *BACHELOR OF ARTS* The Ohio State University (Columbus, Ohio), March 1974
MILITARY SERVICE	*U.S. ARMY* (April 1969 to November 1971) Chief Supply and Procurement Clerk for Headquarters Battery, 36th Field Artillery Group, Babenhausen, Germany. Responsibilities included maintaining property books. Honorable discharge.
REFERENCES	References furnished upon request.

REFERENCES FOR TOM SPANGLER

1. John Berry
   Appropriations Asst.
   Hon. Steny H. Hoyer
   1513 Longworth HOB
   225-4131

2. Frank Phifer
   Professional Staff
   Member
   Subcommittee on Trade
   Committee on Ways
   and Means
   1136 Longworth HOB
   225-3943

3. Tom Arnold
   Assistant Counsel
   Subcommittee on
   Oversight
   Committee on Ways
   and Means
   1105 Longworth HOB
   225-5522

4. Mark Rother
   Legislative Director
   Hon. Al Swift
   1502 Longworth HOB
   225-2605

5. Sean O'Hollaren
   Minority Professional Staff
   Committee on Appropriations
   150 Dirksen SOB
   224-7241

6. Becky Davies
   Minority Clerk
   Subcommittee on Treasury,
   Postal Service and
   General Government
   Committee on Appropriations
   152 Dirksen SOB
   224-7219

7. Patty Lynch
   Clerk
   Subcommittee on Treasury,
   Postal Service and
   General Government
   Committee on Appropriations
   190 Dirksen SOB
   224-6280

8. Kevin Kelly
   Clerk
   Subcommittee on VA, HUD
   and Independent Agencies
   Committee on Appropriations
   142 Dirksen SOB
   224-7231

[ADA Logo and Letterhead]

TELECOPIER COVER SHEET

AMERICAN DENTAL ASSOCIATION
1111 14TH STREET, NW, SUITE 1100
WASHINGTON, DC 20005
(202) 898-2400

DATE: *12/17/92**

TO: *Dr. Allen**

DEPARTMENT: *Ex. Director**

FROM: *Skip**

DEPARTMENT: *Gov. Relations**

PHONE #: *202-898-2400**

REMARKS:

***TOTAL NUMBER OF PAGES (including this sheet:):** *5**

TELECOPIER PHONE # (202) 898-2437

* * *

TRANSMISSION REPORT

202-898-2437

PHONE / TTI No.	312-440-7488
DATE AND TIME	12-17 10:29 AM
DURATION	02:33
MODE	ECM
PAGE	05
RESULT	GOOD

* Handwritten material

AMERICAN DENTAL ASSOCIATION
Applicant Assessment

APPLICANT NAME: Carole Kolstad

INTERNAL (xx) EXTERNAL ( )

POSITION: Dir., Leg. & Legislative Policy
Dir., Council on Governmental Affairs and Federal Dental Services

DEPT: ***Washington Office****

INTERVIEW DATE: December 7, 1992

TIME: 10 am

This assessment form will become part of the candidate's permanent record. Please complete the form following the interview and return it to _____ (Personnel Dept.) within 24 hours after the interview. *Please support comments with specific examples.*

I. Experience

POSITION REQUIREMENTS	*CANDIDATE QUALIFICATIONS*
A. Education/Training: Law degree	A. Qualified
B. Skills: Practical knowledge of Association activities, strong writing skills	B. Candidate has strong practical knowledge of Association's regulatory issues and interests but a less complete background in legislative matters. Writing skills viewed as average.

* Handwritten material

C. Experience: 10 years with legislative body or in policy position in an Association	C. Candidate has adequate, but not superior experience required for the position.

* * *

II. CAPABILITY: Intelligence verbal ability, judgment, resourcefulness, etc.

Below Avg.	Avg.	Above Avg.	Excellent
		x	

Comments: Candidate is professional, thorough with necessary personal skills (intelligence, judgment, etc.) for demands of position.

III. PERSONALITY: Pleasantness, poise, self-esteem, assertiveness, maturity, integrity, etc.

Below Avg.	Avg.	Above Avg.	Excellent
		x	

Comments: Candidate is well regarded among Washington Office staff and federal agency officials with whom she relates.

( ) Recommend offer of employment
( ) Possibly acceptable, but wish to defer decision at this time.
(xx) No further interest in this applicant

Rationale for recommendation: Although candidate has demonstrated skills and abilities, a lack of in-depth, recent experience in legislative issues affecting Association is a major factor in not recommending her for position.

Signature: [illegible] Date: 12/8/92

* * *

AMERICAN DENTAL ASSOCIATION
Applicant Assessment

APPLICANT NAME: Thomas Spangler

INTERNAL (xx) EXTERNAL ( )

POSITION: Dir., Leg. & Legislative Policy
Dir., Council on Governmental Affairs and Federal Dental Services

DEPT: ***Washington Office****

INTERVIEW DATE: December 8, 1992

TIME: 10 am

This assessment form will become part of the candidate's permanent record. Please complete the form following the interview and return it to _____ (Personnel Dept.) within 24 hours after the interview. *Please support comments with specific examples.*

I. Experience

POSITION REQUIREMENTS	*CANDIDATE QUALIFICATIONS*
A. Education/Training: Law degree	A. Qualified
B. Skills: Practical Knowledge of Association activities, strong writing skills	B. Qualified/Superior writing skills

* Handwritten material

C.	Experience: 10 years with legislative body or in policy position in an Association	C.	Qualified/Has produced excellent position papers on major legislative and regulatory issues affecting ADA

* * *

II. CAPABILITY: Intelligence verbal ability, judgment, resourcefulness, etc.

Below Avg.	Avg.	Above Avg.	Excellent
			x

Comments: Candidate has consistently exhibited superior skills in each of these areas.

III. PERSONALITY: Pleasantness, poise, self-esteem, assertiveness, maturity integrity, etc.

Below Avg.	Avg.	Above Avg.	Excellent
			x

Comments: Candidate is well regarded by his peers, subordinates and superiors. Extremely positive personality. Ability to work with others of all skill levels. Mature attitude.

(x) Recommend offer of employment
( ) Possibly acceptable, but wish to defer decision at this time.
( ) No further interest in this applicant

Rationale for recommendation: The candidate's responsibilities as legislative counsel have exposed him to the complete range of Washington legislative and regulatory

activities; and experienced and demonstrated ability which is essential to providing staff direction for the Council on Governmental Affairs and Federal Dental Services.

Signature: [illegible] Date: 12/9/92

* * *

INTER-OFFICE
MEMORANDUM

[ADA Logo and Letterhead]

Date: December 18, 1992 cc: Mr. Wheat
Mr. Salemme

To: Mr. Thomas Spangler
From: Dr. William Allen /s/ WEA
Subject: Promotion

As a result of your application and subsequent interviews for the position of Director, Legislation and Legislative Policy/Director, Council on Government Affairs & Federal Dental Service (Exempt Grade 13) in the Washington Office, it is my pleasure to offer you that position, at a salary of $1,654.00 per week to become effective Monday, December 28, 1992.

If this offer is acceptable to you, please advise Mr. Wheat and Mr. Salemme as soon as possible.

WEA:jg

*Tom**
Looking forward to working with you
Congratulations

/s/ Bill

---

*Handwritten material

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDANT'S RESPONSE[S] TO PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

***[PLAINTIFF'S] REQUEST NO. 2*:**

Paragraph 3 of Section IV-C of the Consent Decree in *Resnick v. American Dental Association*, No. 79-C-3785 (N.D. Ill.), recited that:

> The ADA will continue its current policy of internal posting of all position vacancies prior to external advertisements or formal or informal recruitment. All persons involved in the process of selecting candidates to fill vacancies will be advised that pre-selection of a favored candidate is contrary to ADA's firm policy of giving full and fair consideration to each application. Violations of this policy will have an adverse impact on an employee's annual merit review and will be cause for discipline.

***[ADA'S] RESPONSE*:**

Admit.

***[PLAINTIFF'S] REQUEST NO. 3*:**

The provisions of Section IV-C-3 of the *Resnick v. American Dental Association*, No. 79-C-3785 (N.D. Ill.), expired on or about July 6, 1991.

***[ADA'S] ANSWER*:**

Admit.

[PLAINTIFF'S] REQUEST NO. 4:

After July 6, 1991, and at least through December 31, 1992, the pre-selection of a favored candidate to fill a position vacancy was contrary to the policy of the American Dental Association.

[ADA'S] ANSWER:

Deny. Since the expiration of the consent decree referenced in Plaintiff's Requests for Admissions Nos. 1-3, the American Dental Association has maintained no express policy prohibiting pre-selection. American Dental Association policy states that all applicants will be evaluated equally without regard to the applicant's membership in a protected class.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

PLAINTIFF'S SUPPLEMENTAL PRETRIAL STATEMENT

On Friday, October 6, 1995, Defendant produced two manila files of documents that had, according to ADA counsel, been only recently located. In light of this development, Plaintiff respectfully requests that her Pretrial Statement be amended as follows:

1. Substitute for Plaintiff's previously-marked Exhibit 4: E-Mail Message from Gaymer, Joy J. to All Dated Friday, November 20, 1992 3:30 p.m. Subject: Open Positions with attached Position Description (3 pages);

2. Add Plaintiff's Exhibit 3A: 11/24/92 FAX from Mike Salemme (Human Resources) to Skip Wheat covering November 17, 1992 Revised Position Description Questionnaire for position of Director, Legislation & Legislative Policy Director, Council on Governmental Affairs & Federal Dental Services (9 pages);

3. Add Plaintiff's Exhibit 31: Revised Position Description Questionnaire for Director, Legislation and Legislative Policy; and Director, Council on Governmental Affairs and Federal Dental Services (8 pages);

4. Add Plaintiff's Exhibit 32A: 1988 Position Description Questionnaire for Director, Legislation and Legislative Policy; and Director, Council on Governmental Affairs and Federal Dental Services; and Exhibit 32B; 1991

Position Description Questionnaire for Legislative Counsel;

5. Add Plaintiff's Exhibit 33: Transmission Report and FAX dated 12/17/92 (10:29 AM (E.D.T.) to Dr. Allen from Skip Wheat with Applicant Assessment, which appears to be a duplicate (10 pages);

6. Add a new witness, Cindy Sims, American Dental Association, 1114 Fourteenth Street, N.W., Washington, D.C. 20005, who will testify concerning the preparation of the November 17, 1992 Position Description Questionnaire and related matters.

Defendant consents to the foregoing supplement to Plaintiff's Pretrial Statement.

Respectfully submitted,

/s/ Joseph A. Yablonski
Joseph A. Yablonski, (D.C. Bar No. 91777)
Daniel B. Edelman, (D.C. Bar No. 075101)
YABLONSKI, BOTH & EDELMAN
Suite 800
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

ATTORNEYS FOR PLAINTIFF

Dated: October 10, 1995

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DECLARATION OF KATHLEEN HOWLETT

Kathleen F. Howlett, Esquire, being duly sworn, deposes and says as follows:

1. I currently am Associate General Counsel for the American Dental Association ("ADA") in Chicago, Illinois. I have held this position since 1993.

2. As Associate General Counsel, my duties include overseeing litigation matters handled by outside counsel retained by the ADA. One of the cases for which I have responsibility in this regard is *Kolstad v. American Dental Association*, Civil Action No. 94-1578-TPJ, pending in the United States District Court for the District of Columbia.

3. In or about July of 1995, I was asked by Bruce Harrison of the law firm of Shawe & Rosenthal in Baltimore, Maryland, to locate the originals of the following documents that had been received previously by his office from the ADA Legal Department: (1) any Annual Reviews of Carole Kolstad and Thomas Spangler; and (2) the recruitment file for the position of Director, Legislation and Legislative Policy, Director Council on Governmental Affairs and Federal Dental Services, which was posted on November 20, 1992.

4. After speaking with those involved in the original production of the files to Shawe & Rosenthal and conducting a thorough search of the Legal Department files, I have been

unable to locate the requested documents among the other files related to this case.

5. I state unequivocally that no one in the Legal Department would alter file documents and thus the files sent to Shawe & Rosenthal would not have been altered before their production.

I swear under penalty of perjury and in accord with 28 U.S.C. Section 1742 that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: October 12, 1995

/s/ Kathleen F. Howlett

Kathleen F. Howlett
Associate General Counsel
American Dental Association

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

DECLARATION OF THOMAS DORSCH

Thomas Dorsch, being duly sworn, deposes and says as follows:

1. I currently am the Director of Human Resources for the American Dental Association ("ADA") in Chicago, Illinois. I have held this position since 1983.

2. In my capacity as Human Resources Director, my duties include overseeing the maintenance of employee files and coordinating the transfer of files between the Human Resources Department and other departments within the ADA, such as the Legal Department.

3. The facts set forth in this declaration are based upon by [sic] personal knowledge and experience.

4. In or about April of 1993, I requested and received from Michael Salemme (who was at that time a Manager of Training and Placement in my office) certain documents having connection to the facts underlying a charge of discrimination filed by Carole Kolstad with the Equal Employment Opportunity Commission. These documents included: (1) the entire recruitment file for the position of Director, Legislation and Legislative Policy, Director, Council on Governmental Affairs and Federal Dental Services, which was posted on November 20, 1992; and (2) the 1991 and 1992 Annual Reviews of Carole Kolstad and

Thomas Spangler. Both Ms. Kolstad and Mr. Spangler had applied for the open position.

5. Mr. Salemme was charged by me with gathering these documents because he had been the recruitment coordinator for this position.

6. After receiving these documents, I promptly forwarded them to the Legal Department. To the best of my recollection, I forwarded copies of the Annual Reviews to the Legal Department and the actual contents of the entire recruitment file to the ADA Legal Department. It is my belief that I handled these documents in this manner because it is the normal practice of my Department to respond to inter-departmental requests for Employee Annual Reviews by sending the requester copies, rather than originals, of the documents requested. This practice extends to requests by the Legal department. It is also my Department's practice to respond to requests for certain self-contained non-employee-specific files, such as recruitment files, by forwarding the actual files to the requester.

7. Subsequently, in or about July of 1995, I was asked by the ADA Legal Department to locate originals of the Annual Reviews of Carole Kolstad and Thomas Spangler and the original of the recruitment file for the position of Director, Legislation and Legislative Policy, Director, Council on Governmental Affairs and Federal Dental Services (i.e. those documents that had been forwarded in one form or another to the Legal Department in 1993). Despite several thorough searches of the Human Resources Department, I was unable to locate any of these documents.

8. The absence of originals of these documents in the Human Resources Department files is consistent with the normal practices of my Department. As stated above, it

would be normal practice to send the recruitment file to the Legal Department in toto. Accordingly, the Human Resources Department would not normally be expected to have an original copy of that file, nor would we ordinarily retain a copy. Furthermore, the Annual Reviews of all ADA employees are grouped in files by year rather than kept in files under the employees' names and routinely discarded by my Department after a period of two years. Thus, in 1995 I would not expect to find originals of either Ms. Kolstad's or Mr. Spangler's 1991 or 1992 Annual Review in Human Resource Department files.

I affirm under penalty of perjury and in accord with 28 U.S.C. Section 1746 that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: October 12, 1995

/s/ Thomas Dorsch

Thomas Dorsch
Director, Human Resources Division
American Dental Association

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

PLAINTIFF'S SECOND SUPPLEMENTAL PRETRIAL STATEMENT

Plaintiff Carole Kolstad, with the consent of Defendant American Dental Association, files this second supplemental pretrial statement to include as possible exhibits the following documents that were belatedly discovered in the files of the ADA Office Manager Cindy Simms and were first produced by Defendant for inspection by Plaintiff's counsel on Friday, October 13, 1995.

Exhibit 34. Memorandum to Dr. Allen (with handwritten note to Skip) dated November 17, 1992

Exhibit 35. Letter from Thomas Ginley to Thomas Spangler (March 11, 1991) with "Cindy" handwritten at top right

Exhibit 36. Employee Review of Thomas Spangler 10/91 to 10/92 from Simms' files

Exhibit 37. Employee Review of Carole Kolstad 10/19/91 to 10/5/92 from Simms' files

Exhibit 38. Inter-Office Memorandum from Carole Kolstad to Mike Salemme November 23, 1992 from Simms' files

Exhibit 39. Inter-Office Memorandum to Michael Salemme from Leonard Wheat Applicant Assessment Sheets (May 29, 1991) from Simms' files

Exhibit 40. Inter-Office Memorandum to Nancy Wachelin from Cindy Simms (February 20, 1991)

Exhibit 41. Job Evaluation Request Legislative Counsel from Cindy Simms' files

Exhibit 42. Exempt Performance Appraisal of Thomas J. Spangler for period 9/1/92 to 11/1/93 from Cindy Simms' files

Exhibit 43. Exempt Performance Appraisal of Thomas J. Spangler for period 9/1/93 to 8/31/94 from Cindy Simms' files

Respectfully submitted,

/s/ Joseph A. Yablonski
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ATTORNEYS FOR PLAINTIFF

DATED: October 17, 1995

[Certificate of Service Omitted in Printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted in Printing]

PLAINTIFF'S PROPOSED JURY INSTRUCTIONS

Plaintiff's proposed jury instructions are submitted pursuant to the August 7, 1995 Order of Magistrate Judge Deborah Robinson.

* * *

11. ***Punitive Damages.***

If you find for plaintiff on the question of liability, you may award punitive changes[sic] against the defendant if you further find the defendant engaged in discriminatory practices with malice or with reckless indifference to the plaintiff's civil rights. Evidence that the defendant intentionally violated plaintiff's civil rights will support an award of punitive damages if you, as the jury, find that the conduct merits a punitive award.

To determine the amount of punitive damages to be awarded which will serve as an appropriate penalty against defendant and as a deterrence to others, you should consider defendant's motivations and the degree of purposefulness and wilfulness with which defendant, through its officials, has acted.

42 U.S.C. §1981a; *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995).

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLAINTIFF'S BACKPAY DAMAGES•

1. ***Differential in 1993 compensation:***

Spangler's Salary:	$86,008	
Kolstad's Salary:	-67,674	
Salary Differential without interest:		$18,334

2. ***Differential in 1994 compensation:***

Spangler's Salary:	$90,324	
Kolstad's Salary:	-74,608	
Salary Differential without interest:		$15,716

3. ***Differential in 1995 compensation through October 15, 1995:***

Spangler's Salary:	$94,461	
Kolstad's Salary:	-78,053	
	$16,408	
Salary Differential without interest:	x288/365 days =	
		$12,946
TOTAL SALARY DIFFERENTIAL WITHOUT INTEREST:		**$46,996**
SIMPLE INTEREST AT 9% PER ANNUM:		**$5,722**
BACKPAY DAMAGES:		**$52,718**

• Source: Defendants Answer to Interrogatory No. 7; Letter from Defendant's Counsel to Plaintiff's Counsel dated February 28, 1995; Plaintiff's Salary Memorandum.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * *

[1] WASHINGTON, D.C.
OCTOBER 25, 1995

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS P. JACKSON

* * *

[120] (JURY LEAVING THE COURTROOM.)

THE COURT: . . .

* * *

I tell you in advance, Mr. Yablonski, I will not submit the issue of punitive damages to this jury. There is simply no evidence of malice sufficient to justify an award [121] of punitive damages here.

* * *

[129] MR. YABLONSKI: May I be heard on 3?

THE COURT: What? Punitive Damages?

MR. YABLONSKI: Yes.

THE COURT: All right.

MR. YABLONSKI: Well, I don't know whether the Court — how you want to proceed. I am prepared to talk about what I think are the three P's: Pretext, Preselection and Punitives.

Let me just take this one first. As I read the Court of Appeals decision — most recent decision in Barbour, which is a decision this year, a jury can award punitive damages based

upon the very same evidence upon which the jury determines that an intentional wrong has been done.

THE COURT: Have you got a quick cite for Barbour? [130]

MR. YABLONSKI: 45 F. 3d —

MS. TORPHY-DONZELLA: 48.

MR. YABLONSKI: 48 F. 3d, 1270 at 1277

THE COURT: All right. What you're saying is that there has to be no special evidence of, as the statute refers to it, quote, reckless indifference, close quote, to her federal civil rights?

MR. YABLONSKI: As I read that decision, You Honor, and I will tell you that I read it at 11:15 last night. and —

THE COURT: You were reading long after I was. Go ahead.

MR. YABLONSKI: Well, I make my bed. Sometimes I don't lie in it.

THE COURT: Actually I was watching the world series at 11:00 o'clock.

MR. YABLONSKI: That decision, which is a recent one, says that the jury can make a punitive award based upon the very same evidence upon which it makes a determination of liability.

THE COURT: How do they calculate punitive damages? There is no evidence of net worth or anything else.

MR. YABLONSKI: Well, I think they can calculate punitive damages based upon the respective salaries of the

[131] individuals. They can certainly calculate punitive damages based upon the fact that we're dealing with an organization that has 140,000 members.

Those are factors that I believe a jury can take into consideration. I will be the first to acknowledge that there is a cap.

THE COURT: All right. Let me hear from the other side.

Do you agree that Barbour is the controlling decision?

MS. TORPHY-DONZELLA: Well, quite honestly, I have not read Barbour. And I would like to do so. However I have an initial intellectual reaction to that. That the jury can find punitive damages to be appropriate on the same evidence as they find intentional discrimination doesn't mean that in all cases a finding of intentional discrimination would warrant punitive damages.

It seems to me that statute requires malice or reckless indifference. Cases arising under section 1981 have been used to determine what is an appropriate — whether punitive damages should be considered.

THE COURT: You give me a case that you would like me to read. One.

MS. TORPHY-DONZELLA: Okay. Let me get my cites. [132]

THE COURT: Your best case.

MS. TORPHY-DONZELLA: I am running down the gauntlet. Again, it's under 1981. Smith v. Wade.

THE COURT: Smith v. Wade

MS. TORPHY-DONZELLA: 461 U.S. 30 and for the court's convenience, 54 is the pinpoint cite.

THE COURT: All right. 461 U.S. 30, 54?

MS. TORPHY-DONZELLA: Correct.

THE COURT: All right.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * *

[1] WASHINGTON, D.C.
OCTOBER 26, 1995

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS P. JACKSON

* * *

[64] Judge's charge to the jury

THE COURT:

* * *

[71] In order to prevail on a claim of intentional gender discrimination, the plaintiff must prove by a preponderance of the evidence that the defendant intended to discriminate against her and that the reason or motive for doing so was her gender.

* * *

[78] (JURY LEAVING COURTROOM AT 12:30 P.M.)

THE COURT: All right, counsel. Do you wish to renew your objections previously made to the instructions as given?

MR. YABLONSKI: I do, You Honor, to instructions 11 and 12 on the grounds that we have — with respect to 11, On the ground that we do not believe that that instruction fully and correctly refers to what we think is the guiding decision in this circuit, the Krodel case, which we have [79] mentioned, your honor.

THE COURT: All right. Just so it's clear, you are referring to paragraph 11, is that right, beginning on page 7?

MR. YABLONSKI: Yes. I am sorry.

THE COURT: All right.

MR. YABLONSKI: And paragraph 12 we do not believe correctly cites the criteria under Hicks. That's the St. Mary's case that I mentioned last evening, and Barbour versus Merrill, which I also mentioned to you.

And, lastly, You Honor, we would object or except to Your Honor's charge and the verdict form you used for the failure to permit the jury to return a verdict on punitive damages on the grounds that we previously stated. And I will reiterate Barbour versus Merrill.

THE COURT: All right. Your exceptions are noted.

* * *

* * *

THE DEPUTY CLERK: Madam forelady, has the jury agreed upon a verdict?

THE FORELADY: Yes, sir, we have.

[84] THE DEPUTY CLERK: Do you have the verdict form?

THE FORELADY: Yes.

THE DEPUTY CLERK: May we have it, please?

(CLERK PASSING VERDICT FORM TO THE COURT AND THEN BACK TO THE FORELADY.)

THE DEPUTY CLERK: Madam forelady, does the jury [85] find that the plaintiff Carole Kolstad has proved by a preponderance of the evidence that the defendant American

Dental Association discriminated against her on the basis of her sex by selecting Tom Spangler for the position of Director of Legislation and Legislative Policy and Council on Federal Dental Services?

THE FORELADY: Yes.

THE DEPUTY CLERK: In what amount is Ms. Kolstad entitled to recover damages?

THE FORELADY: $52,718.00.

THE DEPUTY CLERK: Will the remaining jurors please rise?

Ladies and gentleman, your foreperson states that the plaintiff Carole Kolstad has proved by a preponderance of the evidence that the defendant American Dental Association discriminated against her and that you find that the plaintiff is entitled to recover damages in the amount of $52,718.00. Is that the individual verdict of each and every member of the jury?

THE JURORS: Yes.

THE DEPUTY CLERK: Be seated, please.

THE COURT: Do you wish to have the jury polled, Mr. Harrison?

MR. HARRISON: No, You Honor.

THE COURT: All right. The verdict will be [86] recorded.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAROLE KOLSTAD
Plaintiff(s)

v.

AMERICAN DENTAL ASSOCIATION
Defendant(s)

Civil Action No. 94-1578

FILED
OCT 26 1995
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

JUDGMENT ON THE VERDICT FOR PLAINTIFF

This cause having been tried by the Court and a Jury, before the Honorable Thomas P. Jackson, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff CAROLE KOLSTAD have and recover of and from the defendant AMERICAN DENTAL ASSOCIATION the sum of Fifty-two thousand seven hundred and eighteen dollars ($52,718.00), together with costs.

NANCY MAYER-WHITTINGTON,
Clerk

Dated: 10-26-1995 By: /s/ Robert E. West
Deputy Clerk

Supreme Court, U.S.
FILED
DEC 21 1998
OFFICE OF THE CLERK

No. 98-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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80pp

QUESTION PRESENTED

In what circumstances may punitive damages be awarded under Title VII of the 1964 Civil Rights Act, as amended, for unlawful intentional discrimination?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-208

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The en banc opinions of the United States Court of Appeals for the District of Columbia Circuit are reported at 139 F.3d 958 (D.C. Cir. 1998) and are reprinted in the appendix to the petition for a writ of certiorari ("Pet. App.") at pages 1a-41a. The Court of Appeals' orders denying rehearing and granting rehearing en banc are reprinted at Pet. App. 75a-77a. The original panel decision in the Court of Appeals, which is reported at 108 F.3d 1431 (D.C. Cir. 1997), is set out at pp. 42a-68a of the Petition Appendix. The memorandum opinion and order of the United States District Court for the District of Columbia, which is reported at 912 F.Supp. 13 (D.D.C. 1996), is set out at pp. 69a-74a of the Petition Appendix. The October 26, 1992 judgment, that had been entered on the verdict, is reprinted in the joint appendix ("J.A.") at page 111.

JURISDICTION

The Court of Appeals issued its en banc opinions on May 8, 1998. Pet. App. 1a. Petitioner filed her petition for writ of certiorari on July 31, 1998. This Court granted certiorari on November 2, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in the Appendix A to this brief.

STATEMENT OF THE CASE

Petitioner commenced this action in 1994 in the United States District Court for the District of Columbia, alleging that she had been denied a promotion because of her sex in violation of Title VII of the 1964 Civil Rights Act. The complaint sought back pay, injunctive relief and punitive damages.

The case was tried to a jury, which found that petitioner had indeed been the victim of intentional discrimination on the basis of sex. (J.A. 109-10). The district court denied respondent's post-trial motion for judgment as a matter of law on the merits of petitioner's discrimination claim. (Pet. App. 69a-74a). The court of appeals panel which first heard this case unanimously upheld the jury's finding of intentional discrimination.[1] (Pet. App. 46a-49a). The court of appeals declined to grant rehearing en banc with regard to the liability determination. This Court denied a cross-petition seeking review of this aspect of the case. *American Dental Ass'n v. Kolstad*, __ U.S. __ (No. 98-364, Nov. 2, 1998).

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[1] The panel decision overturned the district court's decision denying injunctive relief and counsel fees, and remanded for further consideration of those issues. (Pet. App. 54a-56a).

The issue which was addressed by the court of appeals en banc, and which is the subject of the question presented, is petitioner's claim for punitive damages. The district court refused to instruct the jury on punitive damages. (J.A. 104-109). A divided panel of the court of appeals held that the district court had erred in dismissing petitioner's punitive damage claim. (Pet. App. 42a-68a). The court of appeals granted rehearing en banc limited to this issue. (Pet. App. 75a-76a). A narrowly divided en banc court sustained the rejection of petitioner's punitive damage claim. (Pet. App. 1a-41a).

STATEMENT OF FACTS

Respondent is a Chicago-based professional organization which maintains an office in Washington, D.C. to represent its members' interests before Congress and various federal agencies. In September 1992, Jack O'Donnell, the second-highest ranking employee in ADA's Washington office, announced his retirement at year's end. O'Donnell held the dual-titled position of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. In the fall of 1992 petitioner was working in respondent's Washington office as its Director of Federal Agency Relations, a position that she had held for four years. (Pet. App. 38a). Petitioner ultimately applied for O'Donnell's position, but was rejected in favor of a male candidate, Tom Spangler, who had worked for respondent for less than two years. (Pet. App. 43a-44a).

The jury found that petitioner was denied the promotion in question because she was a woman; the correctness of the jury's special verdict finding of intentional discrimination is no longer subject to dispute. The evidence adduced in support of that verdict, however, remains important to the question of whether petitioner was entitled to have the jury consider her request for punitive damages.

Shortly after O'Donnell announced his intended retirement, petitioner began a series of efforts to confer with the Director of the Washington office, Leonard Wheat, to discuss her interest in O'Donnell's position. Wheat, however, repeatedly refused to meet with her. (Pet. App. 44a, 48a). Although Wheat finally met with petitioner on October 30, 1992, to discuss her interest in the promotion, he failed to pass on her interest in succeeding O'Donnell to respondent's Executive Director, Dr. William Allen, and he only belatedly informed petitioner that he had failed to do so.[2]

The written job announcement for O'Donnell's position expressly required ten years of experience in legislative advocacy or governmental affairs work.[3] Kolstad's legislative work at the Pentagon and her regulatory duties at the ADA plainly satisfied this 10-year requirement; indeed, the "ADA

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[2] Kolstad's written memorandum to Allen (J.A. 52-53) detailed Wheat's persistent rejection of Kolstad's requests to meet with him to discuss the O'Donnell vacancy and Wheat's studied refusal to inform Allen of Kolstad's interest in the position. Kolstad informed Allen that "yesterday when I inquired [of Wheat concerning my request to meet with you on November 16 or 17,] he said that he did *not* discuss this with you here this week and that he would call you yesterday about this. Today he told me that you did not have the time to discuss this when he spoke with you yesterday on the phone." (J.A. 52).

[3] The precise language contained in the vacancy announcement was as follows:

> "JD or LLB degree and at least 10 years experience in legislative advocacy/governmental affairs including a minimum of 3 years related experience with the Federal government, preferably as a Congressional staff member, or with an association or as a legal/legislative representative for a political party; solid knowledge of the Federal system and legislative/regulatory process; strong oral/written communications skills."

J.A. 54-55).

concede[d] that Kolstad 'met the paper qualifications for the vacancy.'" (Pet. App. 47a). By contrast, the court of appeals found, as Wheat and Allen had admitted, that Spangler "technically failed to meet the minimum posted requirements for the position." (Pet. App. 38a; October 20, 1995 Tr. at 70-71; October 23, 1995 Tr. at 156).[4] Despite this problem, Wheat recommended that Spangler be given the promotion and Allen accepted his recommendation.

Although the final selection of Spangler was made by Allen, Wheat played a critical role in the process — not only his efforts to deflect petitioner's pursuit of the job — but also in the actual decision to select Spangler.[5] Under respondent's procedures, Wheat was responsible for filing O'Donnell's job; Wheat, however, asked Allen to make the ultimate decision, albeit in the light of Wheat's recommendation. Wheat, of course, recommended the selection of Spangler. "Allen . . . relied heavily upon Wheat's recommendation of Spangler." (Pet. App. 38a).

Wheat's role was important because there was substantial direct evidence of discriminatory motive on his part.[6]

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[4] Spangler had been a lobbyist for six and one half years. His only other professional experience was as a labor negotiator and consultant, neither of which involved legislative advocacy or governmental affairs. (J.A. 79-80).

[5] Wheat was the acting director of the ADA's Washington office and, thus, O'Donnell's supervisor. He was involved in Allen's revisions of the job description (October 20, 1995 Tr. at 48-49), and the conduit through whom that new description was made available for Kolstad's review. (J.A. 61). Wheat was responsible for interviewing both candidates and claimed that he made a formal recommendation to Allen. (J.A. 84-86, 87-89).

[6] There was also indirect evidence that the ADA maintained, at least in its Washington office, a gender-stratified workforce. Census

Although Wheat was regularly available to work with male employees in the office, he had on numerous occasions refused to meet with petitioner, interfering with her ability to do her work. Oct. 18, 1995 Tr. at 114-15. Wheat also denied petitioner a number of career enhancing opportunities. (Pet. App. 48a-49a). No less tellingly, on a series of occasions Wheat used the epithet "bitch" to refer to professionally prominent women with whom the Washington office worked. (Pet. App. 4a, 22a, 49a). Wheat also regaled his subordinates with off-color jokes about the female anatomy. When petitioner expressly objected to these remarks, Wheat desisted from making them when he was alone with petitioner, but continued to make them in meetings where other employees were also present.[7]

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figures concerning the gender of occupants of managerial positions in the ADA confirmed that women were seriously under-represented in the ADA's upper ranks — Salary Grades 11 through 14. As of the date that O'Donnell's vacancy was posted (November 20, 1992), only 7 of 30 jobs in those grades (23.33%) were occupied by women, none in the ADA's Washington office. (J.A. 46-50).

[7] Kolstad described the reasons she complained to Wheat about jokes referring to the female anatomy at staff meetings and in one-on-one discussions she had with him:

> "A. ...I was offended by these jokes. And I went to him in private and said that these were offensive to me. I thought they were demeaning to women. I didn't think it was appropriate to be making those kinds of jokes at a staff meeting with men and women both present. I thought it was sending a very negative message to women. And I asked him to please stop making those kinds of jokes.
>
> Q. And did he stop making those kinds of jokes?
>
> A. Well, he only stopped making them when — those kinds of jokes when it was just me in his office. He continued to make them at staff meetings after that."

(Oct. 18, 1995 Tr. at 123-124).

At the same time that petitioner was experiencing considerable difficulty conveying her interest in the promotion to the ADA's decisionmakers, Spangler was being actively groomed for O'Donnell's position. (Pet. App. 38a). During September, 1992, Spangler met on a daily basis with O'Donnell to learn about O'Donnell's duties. (Pet. App. 48a). In October, 1992, before the O'Donnell vacancy was officially announced, Wheat approved in writing a career plan for Spangler that included the assumption of certain duties that were then part of O'Donnell's job. (Pet. App. 3a, 44a, 48a). The formal notice soliciting applications for the job was finally distributed on November 20, 1992. (J.A. 54-55). On November 23, 1992, when petitioner asked her secretary to type a memorandum expressing an interest in O'Donnell's job, the secretary — who was also O'Donnell's secretary — was surprised by Kolstad's request because it was obvious to the secretary that Spangler had already been chosen to succeed O'Donnell. (Oct. 20, 1995 Tr. at 8-9).[8]

Allen's actions in Chicago were consistent with the pre-selection scheme afoot in Washington. Under respondent's internal procedures the position could not be filled until a written notice was given to current employees describing the vacancy and the job requirements.

> Compiling a description of O'Donnell's position a few days before posting the job, Allen edited the description to fit Spangler's qualifications. O'Donnell's position description originally stated that its "most important responsibility" was to

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[8] The secretary testified that Spangler, who rarely visited with O'Donnell before the latter's retirement-announcement, met extensively with him throughout the fall of 1992, reviewing materials and planning for Council meetings that were scheduled to be held after O'Donnell's departure. (October 20, 1995, Tr. at 10-15).

> "[m]aintain liaison with federal agencies, bureaus and Administration," corresponding directly to Kolstad's work at ADA. Tailoring the job description to Spangler's specialty, Allen added "Congress" before "federal agencies," and also added whole phrases from the position description questionnaire used to hire Spangler.

(Pet. App. 38a-39a). Although only petitioner and Spangler applied for O'Donnell's job, Allen interviewed only Spangler. (Pet. App. 48a). Allen admitted that he had never bothered to review any of the uniformly laudatory evaluations which petitioner had received from her supervisors during her years of employment with respondent. (Pet. App. 48a; J.A. 18-19; 20-21; 26-27; 28-29).

On December 17, 1992, when Allen called petitioner to explain that he had decided to promote Spangler, he gave her two specific reasons for that choice — that Spangler had greater knowledge of health care reform issues, and that petitioner herself was too valuable in her present position to move. (Pet. App. 45a; October 18, 1995 Tr. at 76-77; Oct. 24, 1995 Tr. at 10-11). At trial, however, Allen abandoned these explanations, instead offering two entirely different reasons for the decision. (October 24, 1995 Tr. at 9). The panel opinion below correctly recognized this change as probative evidence of discrimination. (Pet. App. 48a).

The first of the explanations offered at trial was that Spangler was a better writer than petitioner. Allen acknowledged, however, that he had not read the extensive written material that petitioner had produced during her years with respondent. (October 24, 1995 Tr. at 21-22). Petitioner's annual evaluations had been free of any criticism whatever of her writing until the evaluation of November,

1992, *after* O'Donnell announced his retirement.[9] At the time Wheat personally assured petitioner that his comment that he intended to help her with her writing was not serious, but had been included in her evaluation only because higher officials insisted that he make *some* suggestion about how her work might be improved.[10] Spangler, on the other hand, conceded that in the past his own writing had been sharply criticized in annual performance reviews. (Oct. 25, 1995 Tr. at 34). Allen also testified that he had based his choice on the fact that petitioner lacked legislative lobbying experience. (October 24, 1995 Tr. at 9, 19-20). In fact, however, petitioner had "worked for six years as the principal legislative draftsperson for the Department of Defense, preparing testimony for congressional hearings and representing the Department's interests on Capitol Hill." (Pet. App. 37a).

The jury's finding of intentional discrimination necessarily turned to a considerable degree on its evaluation of the credibility of the defense witnesses. In his closing argument, counsel for petitioner attacked the veracity of those

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[9] In fact, Kolstad's supervisors had repeatedly commended her writing, describing her oral and written communication skills as among her "major strengths" as an ADA employee. J.A. 19, 27. Wheat himself wrote that Kolstad's ADA's work reflected a "[t]horough knowledge of [the] federal regulatory process," "ability to identify, *analyze and communicate complex government rules and policies*" and "[d]isciplined work-habits with attention to detail." (J.A. 29) (emphasis added).

[10] Kolstad testified that Wheat "was in a big hurry", he "threw" the performance appraisal on her desk and said, "'Here's your performance appraisal. I have been directed to put down for everyone in the office something that they need to improve, so for you I put down you ought to improve your writing style.'" He said, "'Don't pay any attention to it. Just ignore it. Don't worry about it. It's not [a] big deal.'" (October 19, 1995 Tr. at 26).

witnesses,[11] while counsel for respondent defended their reliability.[12] Allen testified that he had interviewed petitioner for the O'Donnell job, albeit in a very informal manner;[13] petitioner emphatically denied that that had occurred.[14] Allen and Wheat insisted that there had been no scheme to pre-select Spangler for the promotion in question, a practice which they acknowledged would be improper and unfair. (Oct. 23, 1995 Tr. at 16; Oct. 23, 1995 Tr. at 58-59, 136). In the court of appeals, however, respondent conceded that there was sufficient evidence from which the jury could have found that

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[11] "Some of these witnesses couldn't recall when it was convenient not to recall, could shade things when they wanted to shade it, and some of them told absolute whoppers." (Oct. 26, 1995 Tr. at 21).

[12] Oct. 26, 1995 Tr. at 37 ("What possible motivation would he have for saying that, other than the truth?"); *id.* at 39 ("There is no factual basis to suggest that Ms. Sherman was lying when she testified here. There is every reason, by her demeanor and the way she acted, to believe that she was telling the truth"); *id.* at 42 ("How do you describe Dr. Allen? Try these words. Solid, up front, uncomplicated, and truthful"); *id.* at 46 ("Are all of these people that plaintiff identified now lying? How can that be?")

[13] Oct. 23, 1995 Tr. at 147-48.

[14] Kolstad's testimony on this point was unequivocal:

"Q. Were you ever interviewed by Dr. Allen for this position that you expressed an interest in this memorandum?

A. No, I was not.

* * *

Q . . . What I am trying to define here is you can look at an interview as being the narrowest possible thing. Maybe just riding up on an elevator. Did Dr. Allen ever interview you for this job in that kind of an informal setting or any kind of setting?

B. No. He never discussed the position with me at all."

October 18, 1995 Tr. at 127-128.

such pre-selection had, in fact, occurred. (Pet. App. 47a). O'Donnell testified that his daily meetings with Spangler during the fall of 1992 concerned the preparation of health-care reform compilations (Oct. 25, 1995 Tr. at 78); documentary evidence, however, showed that those reports had actually been completed in January 1992. (Oct. 25, 1995 Tr. at 79).[15]

At trial, petitioner also sought unsuccessfully to introduce a 1984 consent decree to which respondent had agreed in settling an earlier Title VII action alleging systematic discrimination against women in filling management positions.[16] Of particular importance was a provision of the

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[15] Allen insisted that before selecting Spangler he had received in his Chicago office and reviewed Applicant Assessment forms prepared by Wheat for both candidates. (October 23, 1995 Tr. at 152). Facsimile transmission records, however, showed that Allen received those reports only *after* he had decided on December 15, 1992 to award the promotion to Spangler. (J.A. 83-89; Oct. 24, 1995 Tr. at 37). And Allen insisted, improbably, that although he used Spangler's job description when he rewrote the job requirements for O'Donnell's position, he did not have Spangler himself in mind at the time. (Oct. 24, 1995, Tr. at 33-34).

[16] In *Resnick v. American Dental Ass'n*, 90 F.R.D. 530, 536-541 (N.D. Ill. 1981), the district court in Chicago, where the ADA maintains its headquarters, certified a nationwide class of women in a suit brought against the ADA under Title VII and the Equal Pay Act. (Pet. App. 39a). In *Resnick*, plaintiffs had alleged that the ADA had engaged in the systemic denial of promotions to women to high-level "supervisory and management positions" which "perpetuates and exacerbates. . .policies and practices of discrimination." 90 F.R.D. at 534 (internal quotation marks omitted). The case was settled through entry and approval of a consent decree which governed personnel administration in the ADA from 1984 through July 1, 1991. J.A. 91-92. Although the ADA had operated for seven years under the *Resnick* decree, which contained provisions designed to increase the number of females in the upper-echelons of the ADA, only one of the six positions at Grade 13 (which included O'Donnell's job) was occupied by a female as of November 20, 1992. (J.A. 46-47).

decree forbidding respondent to continue to engage in pre-selection in filling those jobs.[17] Although the decree itself had expired in the summer of 1991, barely a year before the events giving rise to this lawsuit, petitioner alleged that it showed that respondent was well aware of the impropriety of using pre-selection to assure the promotion of male employees. Complaint, ¶¶ 13, 25. The court of appeals panel concluded that the district court may have erred in excluding this evidence, and directed that it be reconsidered as probative on the issue of punitive damages. (Pet. App. 53a).

SUMMARY OF ARGUMENT

Section 1981a(b)(1) authorizes an award of punitive damages in any case of "reckless indifference" to federally protected rights. This phrase should be given its ordinary, literal meaning. The terms "reckless" and "indifference" clearly refer to an actor's culpable mental state. That is how this Court has utilized those words in a wide variety of contexts involving such disparate topics as the ADEA, the FLSA, libel, substantive due process, capital punishment, and prison conditions. *E.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

The court of appeals erred in expressly disregarding the language of section 1981a(b)(1) on the asserted ground that

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[17] The relevant part of the *Resnick* decree provided that:

> "All persons involved in the process of selecting of candidates will be advised that pre-selection of a favored candidate is contrary to the ADA's firm policy of giving full and fair consideration to each application. Violations of this policy will have an adverse impact on an employee's annual merit review and will be cause for discipline."

(J.A. 16-17).

the term "reckless" is "among the most malleable and ambiguous in the law." (Pet. App. 6a). To the contrary, recklessness is a familiar concept in tort law applied every day by judges and juries.

When Congress has established a statutory standard for the award of punitive damages, it has almost invariably made a defendant's mental state the criterion. That common law tradition is embodied in section 908(2) of the Restatement (Second) of Torts. If Congress had intended to depart from this well-established practice, it surely would not have used the words "reckless indifference" to signal its desire that neither recklessness nor indifference be considered.

The court below insisted that the literal language of section 1981a(b)(1) should be disregarded in order to create a "two-tiered" remedial scheme under the statute. The petitioners in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), advanced the identical argument regarding the ADEA. This Court rejected that contention because the terms of the ADEA, like the terms of Title VII, do not establish as the statutory standard "consisten[cy] with the principle of a two-tiered liability scheme." 507 U.S. at 616.

The legislative history supports a literal reading of section 1981a(b)(1). Both House reports cited the holding in this Court's decision in *Smith v. Wade*, 461 U.S. 30, 56 (1983), which authorizes in section 1983 cases punitive awards for "reckless or callous indifference to the federally protected rights of others." The Court below erred in insisting that what *Smith* actually held was that punitive awards under section 1983 require proof of egregious practices or barbaric abuse. (Pet. App. 11a-12a).

ARGUMENT

I. PUNITIVE DAMAGES ARE AUTHORIZED UNDER SECTION 1981A(B)(1) WHERE THE DEFENDANT KNEW OR SHOULD REASONABLY HAVE KNOWN THAT ITS CONDUCT WAS PROBABLY UNLAWFUL

Section 1981a(b)(1) provides that punitive damages may be awarded for violations of certain provisions of federal law, including Title VII, where the defendant engaged in the discriminatory practice at issue "with reckless indifference to the federally protected rights of an aggrieved individual." The parties offer decidedly different interpretations of this phrase. The court of appeals held, at the urging of respondent, that this phrase requires proof of "egregious conduct" (Pet. App. 2a, 20a-21a) or "truly outrageous acts of discrimination" (Pet. App. 21a n. 9), such as a "pervasive pattern of discriminatory acts." (Pet. App. 13a). Petitioner urges that the phrase "reckless indifference" means exactly what it says--reckless indifference — and that punitive damages are thus authorized where a defendant knew or should reasonably have realized[18] that its conduct was probably[19] unlawful.

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[18] See Restatement (Second) of Torts, § 500 cmt. a (1965).

[19] See *Herbert v. Lando*, 441 U.S. 153, 172 (1979)(libel reckless if speaker was aware that the statement was a "probable falsehood"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993)(reckless indifference present where employer "more likely knows its conduct to be illegal"); Restatement (Second) of Torts, § 500, cmt. a (conduct is reckless if it involves "a high degree of risk"); W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 34, at 213 (5th ed. 1984)(the usual meaning of reckless is that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow"); *Black's Law Dictionary*, p. 1271 (6th ed. 1990)(action reckless if defendant knew or should have known it was "probably or possibly injurious"); 1 L. Schlueter & Kenneth Redden, *Punitive Damages*, pp. 298 (Arkansas model jury instruction; punitive damages warranted where defendant "knew or ought to have known, in the light of the surrounding circumstances, that his conduct would naturally and probably result in (injury)(damage) and . . . he continued such conduct . . . in reckless disregard of the consequences"), 301 (California model jury instruction; punitive damages warranted where defendant "is aware of the probable dangerous consequences of [his][her] conduct and willfully and deliberately fails to avoid those consequences")(3d ed. 1995).

This dispute about the meaning of section 1981a can readily be resolved in light of the plain meaning of the phrase "reckless indifference."

A. *The Ordinary Meaning of the Phrase "Reckless Indifference to the Federally Protected Rights of an Aggrieved Individual" Requires This Interpretation*

(1) This Court has repeatedly insisted that the interpretation of any statute must begin with the actual language to be construed. "'In determining the scope of a statute, we look first to its language,' . . . giving the 'words used' their 'ordinary meaning.'" *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted). Where the meaning of the statutory text is reasonably clear, that is usually dispositive. "[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but . . . the ingenuity and study of an acute and powerful intellect would discover." *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976) (citations omitted). If the statutory language is arguably subject to several possible interpretations, the text at least limits the alternative interpretations to be considered.

The en banc court below, however, proceeding in an unorthodox manner, disavowed any reliance on the actual

words of the phrase "reckless indifference." The court admitted that interpreting reckless indifference to refer to a culpable mental state had "some superficial plausibility", but then summarily dismissed that argument — and the actual text of the section 1981a(b)(1) — with three sentences:

> It is a stretch, however, to conclude that, in expressing the standard for punitive damages in § 1981a(b)(1), Congress used terms whose meaning is clear or well settled. We said recently that mental-state standards like "recklessness" and "reckless disregard" are among the most malleable and ambiguous in the law. *See Saba v. Compagnie Nationale Air France*, 78 F. 3d 664, 668-69 (D.C. Cir. 1996); see also *United States v. Krizek*, 111 F. 3d 934, 941 (D.C.Cir. 1997). . . . As we have said, the structure of the statute strongly points to a two-tiered scheme of liability; we decline to read the pliable and imprecise language of § 1981a(b)(1) to flatten that scheme.

(Pet. App. 6a).[20]

Under this approach the words "reckless indifference" played no role whatever in the court of appeals' construction

[20] The decision cited by the court below, *Saba v. Campagnie Nationale Air France*, does not describe the mental state of "recklessness" as among the "most malleable and ambiguous in the law." To the contrary, *Saba* held that recklessness was always present where a defendant acted with deliberate disregard of a known danger, including a danger "so obvious 'the actor must have been aware of it.'" 78 F. 3d at 668-69. The only open question recognized in that case was whether "recklessness" under the Warsaw Convention could be also be based on evidence that a defendant *should* have known of a danger, the ordinary civil law standard, or only on actual knowledge of the danger, as is required in a criminal case. *Id.*

of section 1981a(b)(1). The statutory language neither provided a starting point for interpretation of section 1981a(b)(1) nor imposed any limitations on possible interpretations divined by the court below from other sources. The court of appeals did not hold or even suggest that "reckless" means "egregious", that "indifference" means "conduct," or that "reckless indifference" means "egregious conduct." Under this unusual approach the court proceeded as though the statute authorized punitive damages on showing of "malice or -------", with the courts free to insert in that blank whatever meaning they wished.

(2) The core meaning of "reckless," and thus of "reckless indifference" is neither unclear nor unfamiliar. Both refer to a culpable mental state more blameworthy than mere negligence but less than an actual intent to cause harm or violate the law. One modern dictionary defines "reckless" as "utterly unconcerned about consequences; rash" and "indifference" as a "lack of interest or concern." *Webster's College Dictionary*, 684, 1125 (1991). *Black's Law Dictionary* defines "recklessness" as

> The state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences, or which, though foreseeing such consequences, persists in spite of such knowledge. Recklessness is a stronger term than mere or ordinary negligence, and to be reckless; the conduct must be such as to evince disregard of or indifference to consequences . . . .

p. 1271 (6th ed. 1990). Every day state and federal judges and juries familiar with this common meaning apply the standard of recklessness in ordinary tort cases; why judges on the court of appeals in the instant case found the term so

hopelessly ambiguous as to be meaningless is difficult to understand.

In *Smith v. Wade*, 461 U.S. 30 (1983), this Court rejected the contention that "reckless indifference" was "too uncertain a standard" to utilize in determining the appropriateness of punitive damages. 461 U.S. at 49.

> [W]e are not persuaded that a recklessness standard is too vague to be fair or useful. In [*Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489 (1876)], we adopted a recklessness standard rather than a gross negligence standard precisely because recklessness would better serve the need for adequate clarity and fair application.

461 U.S. at 49. The Court stressed that under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), a showing of "reckless disregard for the truth" was sufficient to authorize an award of punitive damages, despite the exacting standard of clarity and notice imposed by the First Amendment. 461 U.S. at 50.

This Court, not surprisingly, has interpreted or applied the phrase "reckless indifference" and the terms "reckless" and "indifference" in a wide variety of contexts. Those decisions consistently treat that language as referring to a culpable mental state, not to the egregiousness vel non of the conduct in question. Were this Court now to declare these terms unintelligibly malleable and ambiguous, such a holding would wreak havoc in the law.[21]

In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), this Court held that conduct violative of the ADEA

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[21] We set out in Appendices B and C to this brief federal statutes using the terms "reckless" and "indifference".

was willful, and thus gave rise to liquidated damages, if the defendant had acted with "reckless disregard" for the rights of its employees. 469 U.S. at 126. The Court explained that the "reckless disregard" standard would be met if an employer acted with a "'careless disregard [for] whether or not one has the right so to act,'" and included within that formulation, a "disregard for the governing statute and an indifference to its requirements." 469 U.S. at 127. No such reckless disregard was present in that case because the defendant had consulted with counsel about its legal obligations and, at worst, had "simply overlooked the challenged aspect" of its practices. 469 U.S. at 130. On the other hand, the disputed practices in *Thurston* were undeniably pervasive, affecting the retirement rights of all the airline's pilots, a group numbering more than a thousand. *See* 469 U.S. at 114.

In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), the Court applied that same "reckless disregard" standard as the test of whether a violation of the FLSA was willful, where the effect of such willfulness is to extend the statute of limitations under the Act from two years to three. 486 U.S. at 133. Again, the decision made clear that the controlling issue was whether the employer had acted "recklessly . . . in determining its legal obligation", a standard that could not be met in the case of employers "who firmly and reasonably (albeit wrongly) believe that their pay practices are lawful...." 486 U.S. at 134 n. 12, 135 n. 13. Despite the fact that the alleged violation involved the wages paid to more than half a dozen employees "in many work weeks" — presumably a pervasive violation — the Court remanded the case for a determination of whether or not the

required culpable mental state was present. *See* 486 U.S. at 129, 135.[22]

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993), again applied the *Thurston* "reckless disregard" standard to an ADEA willfulness claim. 507 U.S. at 615. As before, the Court made clear that the test turned on the employer's attitude toward its legal obligations. A finding of recklessness (and thus willfulness) was required if an employer "more likely knows its conduct to be illegal," 507 U.S. at 617, but not if the employer "incorrectly but in good faith and nonrecklessly believes that the statute permits" the actions in question. 507 U.S. at 616. The Court expressly rejected a proposal to require the plaintiff to "demonstrate that the employer's conduct was outrageous," or to "provide direct evidence of the employer's motivation," and indicated that an employer's efforts to hide its motives tended to support a finding of the requisite culpability. 507 U.S. at 617. The Court remanded the case for application of that standard, despite the fact that the action at issue clearly was not pervasive, since the case concerned only the dismissal of a single 62-year old worker. *See* 507 U.S. at 606.

The Court reiterated this understanding of "reckless indifference," and of its distinction from the egregiousness of the underlying conduct, in *Tison v. Arizona*, 481 U.S. 137 (1987). The issue in *Tison* was whether the death penalty could be imposed on a defendant who did not personally

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[22] *McLaughlin* cited a number of lower court decisions as applying the correct rule. 486 U.S. at 131 n. 1. In *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40 (2d Cir. 1988), the court held that an employer's alleged misleading statements to its employees, and the withholding of information from them, could be "thought by a trier of fact to demonstrate not only deliberate age discrimination but also an appreciation of its illegality and a resultant attempt to conceal it." 837 F. 2d at 45.

commit a murder, but who was involved in the criminal scheme which had led to a killing. This Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient" to meet the constitutionally required level of culpability. 481 U.S. at 158. "Reckless indifference," a separate and critical element, concerned "the mental state with which the defendant commits the crime." 481 U.S. at 156.[23] The defendants in *Tison* had a substantial role in the quadruple murder at issue, having participated in the kidnapping which preceded them, witnessed the killings, and aided subsequent escape efforts. Despite the egregiousness of this conduct, the Court insisted that a separate determination was required as to whether the Tisons had in fact acted with reckless indifference. 481 U.S. at 158. The insistence of the court below that "reckless indifference" is so ambiguous as to be virtually meaningless would, if adopted by this Court, have serious consequences in capital punishment litigation. Under such a decision, any state that has applied the *Tison* "reckless indifference" standard to capital cases since 1986 would presumptively be in violation of the requirements of *Furman v. Georgia*, 408 U.S. 238 (1972).[24] Similar problems would be created for any jurisdiction which, like the United States, treats "reckless disregard for human life" as an aggravating factor in a capital case. *See* 18 U.S.C. § 3591(a)(2)(D).

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[23] The opinion in *Tison* did not consider whether the recklessness required by Arizona law or by the Constitution would require subjective knowledge of the risk of harm, as is common in the criminal law context, or could be satisfied by the broader civil law standard of recklessness, which also covers cases in which a defendant should reasonably have realized that risk existed.

[24] *E.g.* Del. Code Ann., Tit. 11, §§ 636(a)(2), 636(6) (1979)(capital punishment authorized where defendant "recklessly" causes death during the commission of a felony).

The distinction between reckless indifference and egregious conduct was of controlling importance in *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), which held that "reckless indifference" to life in a high-speed automobile chase did not violate the Fourteenth Amendment's guarantee of substantive due process.[25] *See* 118 S.Ct. at 1711. Reckless indifference, the Court noted, was a "mid-level fault" between negligence and intentionally causing injury. 118 S. Ct. at 1720. Such indifference was held not to constitute the "egregious official conduct" that could be said to be arbitrary in the constitutional sense. 118 S. Ct. at 1716.

Under *New York Times v. Sullivan*, 376 U.S. 254 (1964), a public figure seeking to maintain a libel action must show that the defendant knew that its statements were false or acted with "reckless disregard" of the truth. In the instant case, the court of appeals cited *New York Times v. Sullivan* as demonstrating the fatal ambiguity of the language of section 1981a(b)(1). (Pet. App. 6a). In fact, however, *New York Times v. Sullivan* and its progeny have given a specific and familiar meaning to the term "reckless." Under *New York Times* a plaintiff must focus on the

> state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. . . . Inevitably, . . . the thoughts and editorial processes of the alleged defamer would be open to examination.

Herbert v. Lando, 441 U.S. 153, 160 (1979). Thus, *Herbert* held that a libel plaintiff is entitled to discover "state-of-mind evidence", 441 U.S. at 161, 163, "through inquiry into the

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[25] The decision refers interchangeably to reckless and deliberate indifference.

thoughts, opinions and conclusions of the publisher." 441 U.S. at 170. *See Kawaauhau v. Geiger*, 118 S. Ct. 974, 977 (1998) (distinguishing "reckless torts" from the more culpable intentional torts.)

For two decades, the decisions of this Court have held that an inmate alleging that prison conditions constitute cruel and unusual punishment must establish that the defendant acted with "deliberate indifference." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). In these cases, "indifference" has uniformly been understood to refer to a particular culpable mental state and to require a deliberate lack of care, as opposed to merely "an inadvertent failure." 429 U.S. at 105.

> While *Estelle* establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.

Farmer v. Brennan, 511 U.S. 825, 835 (1994). In *Farmer*, this Court noted with approval that

> the Courts of Appeals have routinely equated deliberate indifference with recklessness. . . . It is, indeed, fair to say that acting or failing to act with deliberate indifference of a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.

511 U.S. at 836 (footnote omitted)(citations omitted). *Wilson v. Seiter*, 501 U.S. 294 (1991), reiterated that "deliberate indifference" delineates the "culpable state of mind on the part of prison officials" required to establish a violation of the Eighth Amendment. 501 U.S. at 296; *see id.* at 297, 298.

(3) A literal reading of the phrase "reckless indifference" would be consistent with the standards generally utilized under federal law to determine the availability of punitive damages.

In *Smith v. Wade*, 461 U.S. 30 (1983), this Court set out the standard for awards of punitive damages in civil rights actions under section 1983. All members of the Court agreed that the appropriate standard was a culpable mental state on the part of the defendant, and that that standard included both intentional violations of known legal rights and violations occasioned by ill will or an intent to harm.[26] The majority held that punitive damages could also be awarded where a plaintiff demonstrated that the defendant was guilty of "reckless or callous indifference to the federally protected rights of others." 461 U.S. at 56. This phrase, which Congress in 1991 incorporated with little change into section 1981a(b)(1), was understood by every member of the Court in *Wade* to refer to the defendant's state of mind. *See* 461 U.S. at 42-43 ("that entire want of care which would raise the presumption of a conscious indifference to consequences")(majority opinion), *id.* at 61-62 (dissenting opinion of Justice Rehnquist) (recklessness connotes "a degree of negligence"), *id.* at 93 (dissenting opinion of Justice O'Connor) (describing the majority opinion as authorizing punitive damages for "reckless violations of the Constitution").

The Restatement (Second) of Torts takes a similar approach. To obtain punitive damages a plaintiff must demonstrate "the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1997). "Reckless indifference to the rights of

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[26] 461 U.S. at 37, 41, 51 (majority opinion), *id.* at 61-85 (Rehnquist, J., dissenting), *id.* at 94 (O'Connor, J., dissenting).

others and conscious action in deliberate disregard of them (see §500) may provide the *necessary state of mind* to justify punitive damages." *Id.* at cmt. b (emphasis added). It is the absence of that requisite mental state, not the mildness or infrequency of the violation, which precludes punitive awards.[27] The recklessness standard cited in section 500 of the Restatement turns on the mental state of a defendant.[28]

When Congress has established a statutory standard for the award of punitive damages, it has virtually always made the defendant's mental state the standard to be considered in determining whether such an award should be made. The existence of a culpable mental state is the sole criterion for the award of punitive damages in thirteen of the fourteen statutes which provide a specific standard for punitive damages. Those statutory standards vary from "gross negligence"[29] to "reckless disregard of the law,"[30] "willful disregard,"[31] "conscious, flagrant indifference to . . .rights,"[32]

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[27] "Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." *Id.* at cmt. b.

[28] Restatement (Second) of Torts, § 500 provides:

> "The actor's conduct is in reckless disregard of the safety of another if he does an act . . . knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent."

[29] 26 U.S.C. § 7431(c)(1)(B)(ii); 42 U.S.C. § 669a(c)(3)(A).

[30] 18 U.S.C. § 2724(b)(2).

[31] 11 U.S.C. § 363(n).

[32] 42 U.S.C. § 14503.

"willfulness,"[33] "bad faith"[34] and "intentional violations."[35] Two statutes provide that the magnitude or egregiousness of a violation is a factor bearing on the *amount* of punitive damages, but not on the availability of such an award.[36]

Against the background of this long history of basing punitive awards on a showing that a defendant acted with a culpable mental state, this Court should not lightly infer that Congress intended that a completely different type of standard be applied under section 1981a(b)(1). "[I]f Congress had meant the courts to depart from well-established legal standards, it would have made that intention clear in the

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[33] 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 1681n(a)(2); 18 U.S.C. § 2707(c); 18 U.S.C. § 2724(b)(2); 26 U.S.C. § 7431(c)(1)(B)(ii); 42 U.S.C. § 14503.

[34] 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 1116(d)(11).

[35] 12 U.S.C. § 3417(a)(3); 15 U.S.C. § 78u(h)(7)(A)(iii); 15 U.S.C. § 1681n(a)(2); 18 U.S.C. § 2710(c)(B); 42 U.S.C. § 300aa-23(d)(2)(a).

[36] 15 U.S.C. § 1679g(b) provides that in determining the amount of punitive damages for violations of certain consumer rights "the court shall consider, among other relevant factors--

> (1) the frequency and persistence of noncompliance by the credit repair organization;
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> (2) the nature of the noncompliance;
>
> (3) the extent to which such noncompliance was intentional; and
>
> (4) in the case of any class action, the number of consumers adversely affected."

The amount of punitive awards under 15 U.S.C. § 1691e(b) turns on "among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional."

language of the act." (Pet. App. 50a). Surely Congress would not have used the words "reckless indifference" to signal its desire that neither recklessness nor indifference be considered. The terms of section 1981a(b)(1), authorizing a punitive award where a defendant had engaged in a discriminatory practice "*with* . . . reckless indifference," clearly refer to a culpable mental state accompanying the discrimination, rather than to specific kinds of discriminatory acts. The suggestion that section 1981a(b)(1) requires proof of pervasive discrimination is belied by the statutory language which authorizes such awards for "*a* discriminatory practice." (emphasis added).

B. *The Ordinary Meaning of the Phrase "Reckless Indifference" is Consistent with the Structure of Section 1981a*

(1) The court below reasoned that the phrase "reckless indifference" in section 1981a(b)(1) could not be read literally because section 1981a(a)(1) limits punitive damage awards under Title VII to instances of intentional discrimination. Such a literal reading of section 1981a(b)(1), the court insisted, would be inconsistent with what it believed was an implicit congressional intent to create a "two-tiered" system of remedies. (Pet. App. 5a, 7a-8a, 16a). That two-tiered system, the court asserted, was designed to assure that punitive damages were not available in "every garden-variety" case of intentional discrimination against women or racial minorities. (Pet. App. 18a; *see id.* at 5a (punitive damages not to be available in "the standard case of intentional discrimination")).

This Court has twice rejected this very method of ascertaining the statutory standard for punitive damages. In *Smith v. Wade*, 461 U.S. 30 (1983), the defendant argued that

section 1983 should be construed so that the standard for punitive damages would be "higher in every case than the underlying standard for liability in the first instance." 461 U.S. at 51. In holding otherwise, the Court stressed that there were a number of torts which required such a heightened degree of culpability that evidence sufficient to meet that liability standard would also satisfy the traditional punitive damage standard.

> There has never been any general common-law rule that the threshold for punitive damages must always be higher than that for compensatory liability. On the contrary, both the First and Second Restatements of Torts have pointed out that "in torts like malicious prosecution that require a particular antisocial state of mind, the *improper motive* of the tortfeasor is both a necessary element in the cause of action and a reason for awarding punitive damages." Accordingly, in situations where the standard for compensatory liability is as high as or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without requiring any extra showing.

461 U.S. at 53 (emphasis added)(footnote omitted). The Court also noted that even in such cases the standards governing the actual award of compensatory and punitive damages were necessarily different, because on the requisite showing compensatory damages "are mandatory," while punitive damages "are never awarded as of right . . . the question whether to award punitive damages is left to the jury." 461 U.S. at 52 (citation omitted). As the court below acknowledged, the actual text of section 1981a(b)(1) was taken from the decision in *Smith v. Wade* (Pet. App. 10a, 12a); it is difficult to believe that Congress in expressly using

the language from the holding in *Smith* intended tacitly to reject the reasoning of the underlying decision.

The defendant in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), unsuccessfully advanced a similar argument.[37] The statute in that case imposed liquidated damages for "willful" violations of the ADEA, a term which the Court had construed to mean "reckless disregard" or "indifference" on the part of an employer. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126-30 (1985). A number of lower courts had refused to adhere to *Thurston*, reasoning that an additional requirement of "outrageous" or "egregious" conduct was needed to preserve a two-tiered remedial scheme under the ADEA. *Hazen Paper Co.*, 507 U.S. at 615.[38] This Court rejected both the reasoning and holding of those cases:

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[37] Brief for Petitioners, No. 91-1600, at 46-47 ("a plaintiff must show both that his employer knew or showed reckless disregard that its conduct violated the statute, and further that the employer's actions were repeated . . . or were otherwise harsh, egregious or outrageous. Requiring such proof to establish willfulness in disparate treatment actions fulfills the Congressional intent of a two-tiered ADEA liability.") In advancing this argument the petitioners insisted that liquidated damages under the ADEA were the equivalent of punitive damages. *Id.* at 44. They argued that the *Thurston* "reckless disregard" standard needed to be modified precisely because such language did *not* entail any requirement of egregious conduct. *Id.* at 21-22, 38-47. *See* Reply Brief for Petitioners, No. 91-1600, at 18 (liquidated damages should be permitted "only in cases where the employer's actions meet a higher standard of outrageous or egregious conduct"); *id.* at 13-19.

[38] *E.g. Lockhart v. Westinghouse Credit Corp.*, 879 F. 2d 43, 57-58 (3d Cir. 1989)("systematic discrimination" would constitute such "outrageous conduct"); *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F. 2d 1461, 1470 (5th Cir.) ("actions" must be "egregious"), *cert. denied*, 493 U.S. 842 (1989); *Dreyer v. ARCO Chem. Co.*, 801 F. 2d 651, 658 (3d Cir. 1986) ("outrageous conduct" required), *cert. denied*, 480 U.S. 906 (1987).

> The chief concern of these Circuits has been that the application of *Thurston* would defeat the two-tiered system of liability intended by Congress, because every employer that engages in informal age discrimination knows or recklessly disregards the illegality of its conduct.
>
> We believe that this concern is misplaced. The ADEA does not provide for liquidated damages "where consistent with the principle of a two-tiered liability scheme." It provides for liquidated damages where the violation was "willful."

507 U.S. at 615-16. The court below sought to distinguish *Hazen Paper Co.* on the ground that the statutory language in that case requires "willful" action, not "reckless indifference." (Pet. App. 15a). But *Thurston*, and *Hazen Paper Co.* itself, interpreted the term "willful" in the ADEA to mean recklessness. *Thurston*, 469 U.S. at 126-30; *Hazen Paper Co.*, 507 U.S. at 615-17.

(2) *Hazen Paper Co.* explained that, even if the text of the ADEA had expressly mandated a two-tiered remedial scheme, utilization of a recklessness standard would be consistent with such a requirement. The Court stressed that "[t]he ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a 'bona fide occupational qualification' defense . . . and exempts certain subject matters and persons . . . ." 507 U.S. at 616 (citations omitted). Title VII contains similar limitations.

The court of appeals below believed that, in practice, the BFOQ ("bona fide occupational qualification") exemption in

the ADEA is far broader than the Title VII BFOQ.[39] But the terms of the BFOQ exemptions in Title VII and the ADEA are virtually identical. *Compare* 42 U.S.C. § 2000e-2(e)("bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise") *with* 29 U.S.C. § 623(f)(1) ("bona fide occupational qualification reasonably necessary to the normal operation of the particular business"). This Court noted in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 412 (1985), that Congress borrowed the concept and language of a BFOQ exemption from Title VII when it included the BFOQ clause in the ADEA in 1967. This Court has relied on Title VII BFOQ caselaw when interpreting the ADEA BFOQ clause,[40] and vice versa.[41] In *International Union, UAW v. Johnson*

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[39] For this surprising conclusion it cited "the widespread belief among employers that age can sometimes be a bona fide occupational qualification — a belief reflected in mandatory retirement programs." (Pet. App. 17a). With the exception of certain law enforcement and firefighting jobs, however, age-based mandatory retirement requirements were generally outlawed by the 1986 amendments to the ADEA, six years before *Hazen Paper Co.* and a dozen years before the decision in the instant case. 100 Stat. 3342, 3344. Cases in which employers have asserted BFOQ defenses under the ADEA, far from being "widespread", are relatively uncommon. Most such cases involve police, firefighters, and operators of airplanes and buses. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985)(flight engineers); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)(pilots); *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353 (1985)(firefighters); *Usery v. Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (5th Cir. 1976)(bus operators); *Hodgson v. Greyhound Lines, Inc.*, 499 F. 2d 859 (7th Cir. 1974)(bus drivers), *cert. denied*, 419 U.S. 1122 (1975).

[40] *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 413 n. 18, 414 n. 19, 416 (1984).

[41] *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201-03 (1991).

Controls, Inc., 499 U.S. 187, 201 (1991), this Court observed with regard to the Title VII exemption, "[t]he BFOQ defense is written narrowly, and this Court has read it narrowly. . . . We have read the BFOQ language of . . . the Age Discrimination in Employment Act . . . , which tracks the BFOQ provision in Title VII, just as narrowly."

Like the ADEA, Title VII is subject to a number of express statutory exemptions; in several instances the exemptions contained in Title VII are identical or similar to the exemptions in the ADEA. (1) Section 701(b) defines "employer" to exempt employers who had fewer than fifteen employees in certain weeks in the prior year. 42 U.S.C.§ 2000e(b); *compare* 29 U.S.C. § 630(b)(similar exemption under the ADEA for employers with less than 20 employees). (2) Section 701(f) defines "employee" to exempt elected officials and their personal and policy-making staff. 42 U.S.C. § 2000e(f); *compare* 29 U.S.C. § 630(f)(identical exemption under the ADEA). (3) Section 702 exempts from Title VII aliens, and in some instances United States citizens, working outside the United States for American firms or certain subsidiaries. 42 U.S.C. § 2000e-1; *compare* 29 U.S.C. § 623(h)(similar provision under the ADEA). (4) Section 701(a)(1) exempts Indian tribes and certain agencies of the District of Columbia. 42 U.S.C. § 2000e(b)(1). (5) Section 701(a)(2) exempts any bona fide private membership club. 42 U.S.C. § 2000e(b)(2). (6) Section 703(i) exempts certain practices of businesses "on or near an Indian reservation." 42 U.S.C. § 2000e-2(i). (7) Section 703(f) exempts actions taken with regard to individuals who are members of the Communist Party or certain related organizations. 42 U.S.C. § 2000e-2(f). (8) Title VII, like the ADEA, defines "employee" as "an individual employed by an employer", which means that the coverage of both statutes will turn in some instances on the at times elusive distinction

between an employee and an independent contractor. 29 U.S.C. § 630(f); 42 U.S.C. § 2000e(f). Application of many of these provisions may raise legal or factual issues.

Title VII, like the ADEA, also exempts a number of specific practices which would otherwise fall within the scope of the statutory prohibition. Section 702(a) permits certain religious organizations to hire only individuals of a particular denomination. 42 U.S.C. § 2000e-1(a). Section 703(e)(2) allows educational institutions to limit employment to persons of a particular religion if the institutions are substantially owned or controlled by a religion or if their curriculum is directed toward the propagation of a specific religion. 42 U.S.C. § 2000e-2(e). This Court has twice held that certain forms of affirmative action are permitted by Title VII. *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

Judicial experience with the application of Title VII has identified a number of areas in which intentional action may or may not be "discrimination." First, in some, but not all circumstances, the failure to consider a protected characteristic may violate Title VII. *Compare Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120-23 (1985), *with Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986). Second, unsettled questions remain regarding the scope of the Pregnancy Discrimination Act. 42 U.S.C. § 2000e(k).[42]

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[42] There are, for example, disputes about what medical conditions are "related" to pregnancy or child birth. *Compare Wallace v. Pyro Mining Co.*, 1991 U.S. App. LEXIS 30157, at *3 (6th Cir. 1991) (breast feeding not shown to be within scope of Pregnancy Discrimination Act) *with Turic v. Holland Hospitality Inc.*, 849 F.Supp. 544 (W.D. Mich. 1994), *aff'd in part, rev'd in part*, 85 F.3d 1211 (6th Cir. 1996) (abortion within the scope of the Act), and *Pacourek v. Inland Steel Co.*, 858 F.Supp. 1393 (N.D. Ill. 1994) (infertility within scope of the Act).

Third, with regard to the anti-retaliation prohibition in section 704(a) of Title VII (42 U.S.C. § 2000e-3(a)), considerable disagreement continues among the lower courts regarding both which employee actions are within the scope of the protection and what employer responses are forbidden retaliation.[43]

In sum, Title VII, like the ADEA, is neither an absolute prohibition against all forms of intentional discrimination nor invariably a standard so clear that any intentional act of discrimination would necessarily involve reckless indifference.

(3) In insisting that a literal interpretation of "reckless indifference" would collapse what it believed was supposed to be a two-tiered remedial scheme, the court below proceeded on the assumption that the only illegal actions to which section 1981a(b)(1) applies are violations of Title VII. In fact, however, under section 1981a(a)(2), the remedies in section 1981a extend as well to violations of the Americans With Disabilities Act. Section 1981a(a)(2) provides in pertinent part:

> Disability. In an action brought . . . as provided in section 107(a) of the Americans with Disabilities Act . . . against a respondent . . . who violated . . . section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), or committed a violation of section 102(b)(5) of the Act . . ., the complaining party may recover compensatory and punitive damages as allowed in subsection (b) . . . .

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[43] *Compare Collins v. State of Illinois*, 830 F.2d 692, 702-03 (7th Cir. 1987) (forbidden retaliation not limited to discharge, demotion, or reduction in pay); *Paxton v. Union National Bank*, 688 F.2d 552, 572 (8th Cir. 1982) (same); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 986 (10th Cir. 1996) (same), *with Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997)(contra).

The prohibitions of section 102 of the ADA, like the prohibitions of the ADEA and of Title VII, are subject to several distinct limitations. Because the scope of those limitations, too, raise a variety of legal and factual issues, it would be entirely possible for an employer which reasonably believed it was complying with the law — and thus could not be said to be guilty of reckless indifference — to nonetheless violate section 102.

First, the ADA, unlike Title VII, does not apply to most employees. The ADA prohibits only discrimination against an individual with a "disability," a term defined by the statute to include persons who have "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," who have a record of such impairment, or who are regarded as having such an impairment. 42 U.S.C. § 12102(2). The statutory definition necessarily raises significant issues, regarding, for example, what is a "major life activit[y]". *See* 29 C.F.R. § 1630.2(i)-(l). Second, the prohibitions of section 102 apply only to "qualified" individuals with a disability. 42 U.S.C. § 12111(8). An individual is not "qualified" if he or she cannot "perform the essential functions of the employment position" in question. *See* 29 C.F.R. § 1630.2(m). In order to determine whether a discriminatory act violates the ADA, an employer, like a court, may need to make a variety of factual determinations, and in some instances deal with still unsettled issues in the law.

Third, section 103(b) provides that an employer may refuse to hire an individual with a disability into a position where he or she would pose a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). Thus, if, for example, an employer, acting in good faith reliance on medical advice from a physician with

relevant expertise, declined to hire an applicant with a serious contagious disease, that employer would not be subject to an award of punitive damages, even if a court should later conclude that the individual did not in fact pose a threat to the health of others. *Cf. School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

Congress was without doubt well aware of those issues when it decided to authorize punitive damages in ADA cases; it would be inconsistent with that congressional decision for the courts to require in ADA cases a standard of certainty so high as to generally preclude punitive awards. In an ADA case, as in a Title VII case, determination of the presence or absence of reckless disregard will typically be a fact-specific question for the trier of fact. But the structure of section 102 of the ADA demonstrates that the court below was in error when it asserted that a literal reading of section 1981a(b)(1) would necessarily result in punitive awards in all cases within the scope of section 1981a.

C. *The Ordinary Meaning of the Phrase "Reckless Indifference" Is Consistent with the Legislative History of Section 1981a*

Given the clarity of the language of section 1981a(b)(1), and its consistency with the overall structure of the section, the plain meaning of the statute could be overridden by legislative history — if at all — only in the most compelling circumstances. The touchstone "for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 835 (1990). "[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos*

Drilling Co., 505 U.S. 469, 475 (1992) (citation omitted). At the least, that would require a showing that the relevant committee reports had declared in unambiguous and authoritative terms that the words "reckless indifference" referred not to a culpable mental state but to a particular type of discriminatory practice.

The committee reports in question contain no such admonition that the terms of section 1981a are to be read in some anti-literal manner. Far from declaring that egregious or outrageous conduct is the intended meaning of "reckless indifference," the reports do not single out particular types of discriminatory practices — egregious, outrageous, pervasive or otherwise — as required for punitive damages. The specific explanations of the punitive damage standard paraphrased the text of the then pending legislation. The 1991 report of the House Education and Labor Committee, for example, explained:

> Punitive damages would also be available where the respondent (other than a government, governmental agency or political subdivision) engaged in an unlawful employment practice with malice, or with reckless or callous indifference to the federally protected rights of others. This language sets the same standard courts have applied under section 1981. *See, e.g., Rowlett v. Anheuser-Busch, Inc.*, 832 F. 2d 194, 205 (1st Cir. 1987); *Beauford v. Sisters of Mercy-Province of Detroit, Inc.*, 816 F. 2d 1104, 1108-09(6th Cir. 1987), *cert. denied*, 484 U.S. 913 (1987); *see also Smith v. Wade*, 461 U.S. 30, 56 (1983)(construing 42 U.S.C. sec. 1983).

H.R. Rep. No. 102-40(I), 102d Cong., 1st Sess. at 74 (footnotes omitted). Opponents of the bill expressly objected to this citation to *Rowlett*, noting that that decision had

rejected any requirement of "outrageous behavior." (*Id.* at 143-44 n. 14)(Additional views of Mr. Armey). The report of the House Judiciary Committee explained:

> This standard for punitive damages is taken directly from civil rights case law. As was noted in *Stallworth v. Shuler*, 777 F. 2d 1431, 1435 (11th Cir. 1985)(a Section 1981 case):
>
> > Punitive damages are of course available under 42 U.S.C. §§ 1981 and 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protection rights of others."
>
> quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)(a Section 1983 case).

H.R. Rep. No. 102-40(II), 102nd Cong., 1st Sess. at 29. Nothing in these passages indicated that section 1981a(b)(1) was to be read other than literally.

The court of appeals asserted that the actual meaning of this passage — and thus of section 1981a(b)(1) — should be divined by scrutinizing the cited cases for evidence that "reckless indifference" might, in fact, mean something else. (Pet. App. 9a-15a). On this view, the framers of the committee reports intended the quoted passage to declare that "reckless indifference means egregious conduct," and decided to communicate that intent covertly by citing cases which purportedly adopt an egregious conduct standard. This approach is fatally flawed. It is simply not to believed that the House Education and Labor Committee and the House Judiciary Committee would have chosen to send the full House such a coyly encrypted message. When a committee report describes the provision of a bill as adopting a particular

standard, and then cites cases as authority for that standard, the committee must be presumed to have understood the cases to adopt the same standard as that set out in the report itself. Congressional committees could not risk ever citing cases in their reports if the courts were thereafter free to disregard the actual language of the reports and legislation, and instead treat the report as a commission to give to the legislation whatever meaning judges thereafter might choose to read into the cited opinions. Surely, the members of the 102nd Congress themselves could not have understood the reports as a warning that the meaning of the bill was to be gleaned, not from the text of the bill or the reports, but by reading and interpreting the cited opinions.

The manner in which the court of appeals implemented this unorthodox method of analyzing legislative history well illustrates its unsoundness. The court below readily conceded that one of the cited lower court cases, *Rowlett v. Anheuser-Busch, Inc.*, "supports Kolstad's position" (Pet. App. 9a; *see* 832 F. 2d at 205-07), and simply ignored the reference to another: *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985). The elements of the discriminatory scheme which *Stallworth* recognized as indicating the defendant's awareness of the illegality of its actions bear a striking resemblance to the facts of the instant case. In upholding the award of punitive damages, the court of appeals in *Stallworth* had stressed that the trial court had considered the defendant's "actions in conducting a sham selection procedure and in having job requirements changed after the fact to be deliberate and knowing actions to violate plaintiff's civil rights." 777 F. 2d at 1435.[44]

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[44] In upholding punitive awards under Title VII, a number of lower courts have relied on evidence that an employer perpetrated the discrimination through a deliberate scheme, engaged in duplicitous

The court of appeals insisted, however, that the opinion of a single judge[45] in a third cited case, *Beauford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 1104, supported an egregious conduct standard. (Pet. App. 8a). In fact, however, *Beauford* contains five different articulations of the culpable mental state (other than malice) sufficient to warrant punitive damages: "reckless or callous indifference to the federally protected rights of others," "reckless or callous disregard," "reckless or callous indifference of an egregious character," "willfulness," and "egregious disregard of the plaintiff's federal rights." 816 F. 2d at 1108-09 and n. 4. *Beauford* refers to egregious conduct, not as a definition of this mental state, but as an alternative basis for punitive damages.[46] It is inconceivable that the reference in one of the House reports to this loosely worded lower court opinion could have been intended by the authors or understood by

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behavior, or lied about its actions or motives. *Kim v. Nash Finch Co.*, 123 F. 3d 1046, 1066-67 (8th Cir. 1997)(relying on fact that perpetrator both lied and doctored victim's personnel file); *Merriweather v. Family Dollar Stores of Ind., Inc.*, 103 F. 3d 576, 582 (7th Cir. 1996)(punitive award justified where employer "attempt[ed] to deceive the court, by presenting false reasons for its decision to discharge"); *Patterson v. P.H.P. Healthcare Corp.*, 90 F. 3d 927, 943 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997)(relying on discriminator's actions "in falsifying documents to establish a paper trail.")

[45] Of the three judges participating in this decision, one dissented and one concurred only in the result. *Beauford*, *supra*, 816 F. 2d at 1110.

[46] *E.g.* 816 F. 2d at 1109 ("The imposition of punitive damages in civil rights actions has generally been limited to cases involving egregious conduct *or* a showing of willfulness or malice . . . .")(emphasis added) (citations omitted).

Even the Sixth Circuit does not appear to interpret *Beauford* to require proof of egregious conduct. *Moreno v. Consolidated Rail Corp.*, 63 F. 3d 1404, 1419-21 (6th Cir. 1995), *vacated on other grounds*, 99 F. 3d 782 (6th Cir. 1996)(en banc).

congressional readers as an authoritative admonition that neither the reports nor the bill itself meant what they appeared to say.[47]

The court below offered an even more far-fetched account of the reports' citations to this Court's decision in *Smith v. Wade*. The court acknowledged that the passage in *Smith* actually referred to by the committees was the holding at the end of the majority opinion. (Pet. App. 10a).

> We hold that a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

461 U.S. at 56. The language of section 1981a(b)(1) was avowedly taken from this very passage. The court below, however, simply dismissed the Committee's explicit reference to this very passage, deeming it a mere "isolated citation to *Smith's* linguistic formula." (Pet. App. 10a). Having thus set aside the portion of the *Smith v. Wade* opinion actually relied upon by the House reports, the court of appeals then proceeded to construe the reports to adopt as the statutory standard a very different rule which that court argued could be connected in some way to *Smith*.[48]

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[47] The court of appeals argued, in the alternative, that the authoritative meaning of the House Report should be divined by reading and construing pre-1991 section 1981 cases which the House Committee never cited at all. (Pet. App. 8a).

[48] "[W]e construe *Smith* as establishing a threshold requirement of egregiousness for the imposition of punitive damages in § 1983 cases." (Pet. App. 12a).

First, rather than rely on the actual holding in the 1983 decision in *Smith*, the court of appeals proposed to invoke instead, differently worded passages in decisions handed down in 1859 and 1876 that had been quoted in *Smith*.[49] But *Smith v. Wade* is, and was referred to by the House Report as, a *decision*, not some sort of A.L.R. Annotation from which later courts (or members of Congress) were free to pick whichever citation they might fancy. The majority opinion in *Smith v. Wade* quotes sixteen prior opinions and cites more than 150 others; only the holding in the majority opinion embodies the standard referred to in the committee reports.

Second, the court below cited a passage in *Smith v. Wade* which observed that "deterrence of future egregious conduct is a primary purpose of . . . punitive damages." (Pet. App. 11a *quoting* 461 U.S. at 49). But this passage is immediately followed by a citation to section 908 of the Restatement (Second) of Torts regarding "outrageous conduct," which in turn explicitly explains that it is "the defendant's evil motive or his reckless indifference to the rights of others" which renders the conduct "outrageous."[50] "As *Smith v. Wade* and § 908 of the Restatement (Second) of Torts make clear, misconduct is 'extraordinary' (in the language of the *Smith v. Wade* instruction) or 'outrageous' (in the language of the Restatement) *because of the intent of the wrongdoer*." *Rowlett*

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[49] Pet. App. 11a-12a (*quoting Philadelphia, W. & B. R. Co, v. Quigley*, 62 U.S. 202, 214 (1859), and *Milwaukee & St. Paul R. Co. v. Arms*, 91 U.S. 489, 495 (1876)).

[50] "Punitive damages may be awarded for conduct that is outrageous, *because* of the defendant's evil motive or his reckless indifference to the rights to others." Restatement (Second) of Torts, § 908(2) (1997)(emphasis added). Similarly, comment b states, "The conduct must be outrageous, either *because* the acts are done with an evil motive or *because* they are done with reckless indifference to the rights of others." (emphasis added).

v. Anheuser-Busch, Inc., 832 F. 2d at 206 (emphasis in original).

Third, the court of appeals stressed that the plaintiff in *Smith v. Wade*, in order to establish a violation of the Eighth Amendment, had been required to prove "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." (Pet. App. 11a *quoting* 461 U.S. at 50-51.) It reasoned that *Smith* therefore meant that punitive damages could be awarded only for discriminatory conduct "equivalen[t]" to such barbaric physical abuse. (Pet. App. 11a). This analysis improperly conflates the standard for establishing a violation of the Eighth Amendment with the standard for awarding punitive damages under section 1983. The actual holding in *Smith* contains no requirement that barbarity be established in order to obtain punitive damages;[51] it is expressly an announcement of the standard in all section 1983 cases, none of which — other than Eighth Amendment cases — requires proof of any such abuse to establish a constitutional violation. To establish the constitutional violation at issue in *Smith*, the plaintiff was also obligated to prove that the he was in custody and had been injured as a result of state action, yet neither such proof is required in order to obtain punitive damages under Title VII.

As we explained in part I(B)(2), *supra*, not every case of intentional discrimination will involve reckless indifference. The legislative history of section 1981a(b)(1) reflects an

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[51] "The Court [in *Smith*] made no mention of any requirement that, in addition to charging the jury about the level of intent necessary to support punitive damages, a trial court also explain to the jury that the misconduct be 'extraordinary' or 'outrageous.'" *Rowlett v. Anheuser-Busch, Inc.*, 832 F. 2d at 206.

understanding of that distinction.[52] Beyond that, the history is somewhat conflicting. The legislative history of the 1991 Civil Rights Act, as this Court noted *Landgraf v. USI Film Products*, 511 U.S. 244, 262 & n. 15 (1994), was particularly partisan; not surprisingly, characterizations of the distinction varied somewhat among the supporters and opponents and changed over the course of the debates. In April 1991, opponents of section 1981a(b)(1) described it with alarm in quite expansive terms:

> [O]ne might ask when, if ever a jury would find that proven intentional discrimination by an employer did not constitute the requisite level of abuse. Indeed, in the case of *Rowlett v. Anheuser-Busch* . . . the court awarded . . . $300,000 in punitive damages . . . under 42 U.S.C. 1981 even though there was [sic] "no overt acts of racial discrimination." . . . In rejecting the employer's contention that some form of outrageous behavior was required, although applying the same test as H.R.1 proposes, the court noted, "After all, can it really be disputed that intentionally discriminating against a black man on the basis of his skin color is worthy of some outrage?" . . . In sum, the court equated a jury finding of intent . . . with the level of abuse necessary to award punitive damages. Most alarmingly, this case has been cited with approval in the Majority Report.

H.R. Rep. No. 102-40(I), *supra*, at 143-44 n.14 (Additional Views of Mr. Armey). In October 1991, the very members who had earlier led the opposition to the bill, having accepted section 1981a(b)(1) without any changes in the standard for

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[52] H.R. Rep. No. 40(I), 102nd Cong., 1st Sess. at 72.

punitive damages, now characterized that same language as extremely restrictive. *E.g.*, 137 Cong. Rec. 15,473 (Oct. 30, 1991)(Interp. Memo of Sen. Dole, *et al.*) ("[p]unitive damages. . . are to be awarded only in extraordinarily egregious cases.") The complex posturing that often characterized the floor debates regarding this controversial legislation are — as the Court in *Landgraf* recognized, 511 U.S. at 262 & n. 15; 511 U.S. at 287 & n. 1 (Scalia, J. concurring in the judgment) — of limited value. In any event, "[t]he short answer to this is that the plain language of the statute . . . is inconsistent with these statements." *Luciano v. Olsten Corp.*, 110 F. 3d 210, 220 (2d Cir. 1997).

II. PUNITIVE DAMAGES ARE AUTHORIZED UNDER SECTION 1981A(B)(1) WHERE THE DEFENDANT INTENDED TO VIOLATE FEDERAL LAW OR ACTED WITH ILL WILL OR INTENT TO CAUSE INJURY

Section 1981a(b)(1) also authorizes punitive damage awards in any case in which the defendant engaged in a discriminatory practice "with malice." The treatment of this alternative standard by the court of appeals is exceedingly obscure. The only portion of the opinion that appears to refer to this standard requires proof of "genuine spite and malevolence." (Pet. App. 13a). A footnote on that same page, however, seems to deny that the majority is equating "malevolence" with "malice." (Pet. App. 13a n. 4).

Because the language in section 1981a(b)(1) was avowedly taken directly from *Smith v. Wade*, "malice" should be construed to encompass those circumstances other than reckless indifference in which the *Smith* majority believed punitive damages would be warranted. *Smith v. Wade* indicated that punitive damages would also be permissible where a defendant had acted out of ill will, with an intent to

cause harm, or with an intent to violate the law. 461 U.S. at 37, 41, 51.

The en banc majority acknowledged that the head of respondent's Washington, D.C. office had used the epithet "bitch" to refer to several professionally prominent women. It dismissed this evidence, however, arguing that "sexist remarks, tasteless and lamentable though they may be, are 'not always conclusive of sex discrimination.'" (Pet. App. 22a). The appellate court erred in attempting to impose its own assessment of the significance and weight of this evidence. Evaluation of such remarks is the core function of the trier of fact, in this case the jury. Whether or not use of such an epithet demonstrates genuine misogyny would undoubtedly require a fact-specific assessment of the circumstances in which the statement was made. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 577-79 (1985).

The court of appeals also dismissed this evidence on the ground that "[Washington, D.C. officer manager] Wheat . . . did not make the decision to promote Spangler over Kolstad; [national executive director] Allen did." (Pet. App. 22a). Less than a year ago in *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), this Court expressly rejected this sort of distinction. The Court in *Ellerth* made clear that an employer is liable for discriminatory actions of a supervisor, even where, as here, higher officials might also be involved in the decision. 118 S. Ct. at 2269 *citing Shager v. Upjohn Co.*, 913 F. 2d 398, 405 (7th Cir. 1990).[53] This case easily falls within

[53] The discriminatory supervisor in *Shager* had not personally dismissed the plaintiff, but instead had allegedly helped to bring about that dismissal by the employer's Career Path Committee "by portraying Shager's performance to the committee in the worst possible light." 913 F. 2d at 405.

the scope of *Ellerth*. The denial of a promotion is, of course, a tangible employment action; there was ample evidence that Wheat's actions and views played a significant role in Allen's ultimate decision. (*See* pp. 4-6, *supra*). At trial, respondent sought without success to convince the jury that Allen's actions were not tainted by Wheat's biases;[54] such factual disputes cannot be relitigated here.

[54] *Compare* Oct. 26, 1995 Tr. at 32 (closing argument of counsel for respondent)("It doesn't make a difference what 'Skip' Wheat did or did not want in terms of the selection, because . . . the person who was making this decision was Dr. Allen, not Mr. Wheat.") *with id.* at 58(closing argument of counsel for petitioner)("Did Leonard Wheat have something to do with selecting the person for this job? You bet he did.")

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATUTORY APPENDIX

Section 102 of the Civil Rights Act of 1991 states as follows:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil Rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964, (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29

concerning the provision of a reasonable accommodation, or section 102 of the American with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the American with Disabilities Act of 1990, or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of

relief authorized under section 706(g) of the Civil Rights Act of 1964.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 U.S.C. § 1981a.

The relevant provisions of the Americans with Disabilities Act of 1990 ("ADA") are as follows:

Section 3(2) of the ADA provides that, as "used in this chapter,"

* * *

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

Section 101 of the ADA contains the following definitions:

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be

given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time and modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

* * *

42 U.S.C. § 12111(8)-(9)

Section 102 of the ADA, entitled "Discrimination," provides as follows:

(a) General Rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship

on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such tests purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In General

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if

compliance with this section would cause such covered entity to violate the law of the foreign country in which such in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelations of operations

(ii) the common arrangement;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry.

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subject to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature of severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12112.

Section 103 of the ADA contains the following "Defenses:"

(a) In general

It may be a defense to a charge of discrimination under this chapter than an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

* * *

42 U.S.C. § 12113(a)-(b).

APPENDIX B

FEDERAL STATUTES USING THE TERM "RECKLESS"

8 U.S.C. § 1324(a)(1)(A)(ii) and (iii) (imposing criminal penalties on persons who harbor an alien "knowing or in reckless disregard of the fact" that the alien entered the United States unlawfully).

8 U.S.C. § 1324c(a)(5) and (f) (imposing criminal penalties on persons who help prepare or file certain documents "with knowledge or in reckless disregard of the fact that" such document is false).

12 U.S.C. § 164(c) (authorizing civil penalties for the filing of certain false banking reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 324 (authorizing imposition on member of the federal reserve system of civil penalties for filing false reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1464(v)(6) (authorizing civil penalties on federal savings institutions for filing false reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1467a(r)(3) (authorizing imposition of civil penalties on certain holding companies for filing false reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1701q-1(h) (authorizing civil penalties against mortgagors which have "actual knowledge of or act[ ] with deliberate ignorance of or reckless disregard for the prohibitions under this section").

12 U.S.C. § 1723i(g) (for purposes of certain civil penalties imposed on issuers "[t]he term 'knowingly' means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

12 U.S.C. § 1735f-14(g) (same definition regarding civil penalties imposed on certain participants in FHA programs).

12 U.S.C. § 1735f-15(h) (same definition regarding civil penalties against multifamily mortgagors).

12 U.S.C. § 1782(a)(3) (authorizing civil penalties against certain insured credit unions for filing false reports "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1786(k)(2)(B)(i)(II) and (C)(ii) (authorizing civil penalties against credit unions and officials who "recklessly engage[ ] in an unsafe or unsound practice" or "knowingly or recklessly cause a substantial loss" to a credit union).

12 U.S.C. § 1817(a)(1) (authorizing civil penalties against certain banks for submitting or publishing a false report "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 1818(b)(6)(A)(ii) (authorizing order directing restitution where bank's violation "involved a reckless disregard for the law").

12 U.S.C. § 1847(d)(3) (authorizing penalty if any bank holding company submits a false report "knowingly or with reckless disregard for the accuracy of any information").

12 U.S.C. § 3110(c)(3) (authorizing civil penalties for certain foreign banks for filing a false report "knowingly or with reckless disregard for the accuracy of any information").

15 U.S.C. § 77t(d)(2)(B) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 78u(d)(3)(B)(ii) and (iii)(aa) (same).

15 U.S.C. § 78u-2(b)(2) and (3)(A) (same).

15 U.S.C. § 78u-2(c)(1) (in determining whether to impose a penalty agency may consider whether violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80a-9(d)(2)(B) and (C)(i) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80a-9(d)(3)(A) (in determining whether to impose a penalty Commission may consider whether violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80a-17(i) (employment contract of certain underwriters cannot protect underwriter from liability for "reckless disregard of his obligations and duties under such contract").

15 U.S.C. § 80a-41(e)(2)(B) and (C)(I) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80b-3(i)(2)(B) and (C)(i) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80b-3(i)(3)(A) (in determining whether to impose a penalty Commission may consider whether violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 80b-9(e)(2)(B) and (C)(I) (authorizing higher penalties in certain securities cases where violation involved "deliberate or reckless disregard of a regulatory requirement").

15 U.S.C. § 1717a(f) (defining "knowingly" to mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

18 U.S.C. § 33(a) (imposing criminal penalties on any person who places an explosive or destructive substance on any motor vehicle "with a reckless disregard for the safety of human life").

18 U.S.C. § 35(b) (imposing criminal penalties on any person who imparts certain false information "willfully and maliciously, or with reckless disregard for the safety of human life").

18 U.S.C. § 922(q)(3)(A) (imposing criminal penalties on the discharge of firearms under certain circumstances "knowingly or with reckless disregard for the safety of another").

18 U.S.C. § 1365(a) (imposing criminal penalties on persons who tamper with a consumer product "with reckless disregard for the risk that another person will be placed in danger of death or bodily injury").

18 U.S.C. § 1861 (imposing criminal penalties on persons who falsely represent that certain land is public land "with intent to deceive the person to whom such representation is made, or . . . in reckless disregard of the truth").

18 U.S.C. § 1864 (a)(3) (imposing criminal penalties on person who use a hazardous device on federal land "with reckless disregard for the risk that another person will be placed in danger of death or bodily injury").

18 U.S.C. § 2424(a) (imposing filing requirement on any person who for the purpose of prostitution supports or harbors an alien "knowing or in reckless disregard of the fact that the individual is an alien.")

18 U.S.C. § 2724(b)(2) (authorizing punitive damages upon proof of "willful or reckless disregard of the law" regarding confidentiality of motor vehicle records).

18 U.S.C. § 3146(c) (affirmative defense to prosecution for failure to appear in court not available if defendant acted "in reckless disregard of the requirement to appear").

18 U.S.C. § 3591(a)(2)(D) ("reckless disregard for human life" an aggravating factor in capital case).

Federal Sentencing Guidelines § 2K1.5(b)(1) (15 level increase where the offense was committed "with reckless disregard for the safety of human life").

Federal Sentencing Guidelines § 2Q1.6(a)(3) (higher base offense level if offense involved "reckless disregard to the risk that another person would be placed in danger of death or serious bodily injury").

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21 U.S.C. § 321(bb) ("knowingly" includes "acts in deliberate ignorance or reckless disregard of the truth or falsity of the information").

21 U.S.C. § 842(a)(11) (imposing criminal penalties on persons who provide certain laboratory supplies "with reckless disregard for the illegal uses to which such a laboratory supply will be put").

31 U.S.C. § 3729(b)(3) (persons who present false claims for payment knowingly or "in reckless disregard of the truth or falsity of the information" are liable for civil penalties).

31 U.S.C. § 3801(a)(5)(C) (persons presenting false claims "in reckless disregard of the truth or falsity of the claim or statement," are liable for civil penalties).

31 U.S.C. § 3803(c)(2)(B)(iii)(III) (persons seeking benefits who act "in reckless disregard of the truth or falsity of the claim or statement" are subject to civil penalties).

42 U.S.C. § 1320a-7a(i)(7)(B) (the term "should know" means that a person with respect to information "acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent is required").

42 U.S.C. § 1437z-1(h)(2) (defining "knowing" to mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

42 U.S.C. § 3537a(e)(4) (defining "knowing" to mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

42 U.S.C. § 3545 (m)(5) (defining "knowing" to mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibitions under this section").

49 U.S.C. § 46505(c) (increased penalty for violations of section "with reckless disregard for the safety of human life").

49 U.S.C. § 46507(1) (imposing criminal penalties for giving false information "with reckless disregard for the safety of human life").

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15 U.S.C. § 2205 (administrator authorized to take steps to "overcome public indifference as to fire and fire prevention").

16 U.S.C. § 5401(7) (program authorized to redress "the adverse consequences of a period of indifference").

18 U.S.C. § 831(b)(1)(B)(i) (authorized increased term of imprisonment for violations "manifesting extreme indifference to the life of an individual").

18 U.S.C. § 1365(a) (imposing criminal penalties on certain persons guilty of tampering with consumer products "under circumstances manifesting extreme indifference to" risk of death or bodily injury).

18 U.S.C. § 1864(a)(3) (imposing criminal penalties on persons suing a hazardous device on federal lands "under circumstances manifesting extreme indifference to" risk of death or bodily injury).

Sentencing Guidelines § 2Q1.6(a)(3) (higher base offense level for certain actions "under circumstances manifesting extreme indifference to" risk of death or serious bodily injury).

30 U.S.C. § 1291(29) ("unwarranted failure to comply" with a permit "means the failure of a permittee to prevent the occurrence of any violation of his permit . . . due to indifference, lack of diligence, or lack of reasonable care").

42 U.S.C. § 14503(a)(3) (immunity for certain volunteers not available if they acted with "flagrant indifference to the rights or safety of the individual harmed by the volunteer").

49 U.S.C. § 28103(a)(1) (punitive damages may be awarded against rail passenger carrier only on proof of a "conscious, flagrant indifference to the rights or safety of others").

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In The

Supreme Court of the United States

October Term, 1998

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether punitive damages may be awarded in the jury's discretion in cases of intentional discrimination under Title VII of the 1964 Civil Rights Act, in the absence of egregious conduct.

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No. 98-208

In The

Supreme Court of the United States

October Term, 1998

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

A. Introduction.

Respondent American Dental Association ("ADA") is a Chicago-based professional organization whose purpose is to promote the art and science of dentistry and the oral health of the public. It maintains an office of approximately 17 employees in Washington, D.C. who advocate the interests of the ADA and its members' patients before

Congress and Executive Branch agencies (Pet App. 43a; Oct. 23, 1995 Tr. 102-03).

Plaintiff was a high-level, highly compensated employee who worked in the ADA's Washington office. From the time of her hire in 1988, she received regular raises in salary. There is no evidence that she was ever harassed or belittled, and she testified at trial that she generally was pleased about the way she was treated (Oct. 19, 1995 Tr. 53, 55, 59). In 1991, her position was raised in grade, with an increase in pay. After her first and only request for promotion was denied in 1992, she did not tell anyone she believed the decision was based on her gender. Instead, she testified that she was willing to "be gracious about it" and accept the outcome if she could have a salary increase equivalent to what she would have earned in the promotion (*id.* Tr. 20, 57-58, 107-08). While she received in increase in pay thereafter, this lawsuit ensued (*id.* Tr. 19-20).

B. The Promotion Decision at Issue.

In the summer of 1992, Jack O'Donnell, who held the dual role of Director of Legislation and Legislative Policy and Director of the Council on Governmental Affairs and Federal Dental Services ("Legislative Director"), indicated interest in early retirement (Oct. 19, 1995 Tr. 75-76). O'Donnell's job was to analyze proposed Congressional legislation of interest to the dental profession and dental patients and to recommend a course of action (*e.g.*, present officials of the ADA to testify before Congress on the matter, submit written comments to the relevant committee only, or do nothing). Also, it was O'Donnell's task to draft the appropriate documents to communicate the ADA's position in a persuasive manner. O'Donnell was well regarded as a clear writer with a deft understanding of

Congress and the legislative process (Pet. App. 3a, 43a; Oct. 25, 1995 Tr. 50-55, 117-18).[1]

Thomas Spangler, who was Legislative Counsel for the ADA, expressed an immediate interest in the prospective job opening (Oct. 24, 1995 Tr. 127-28). Spangler's activities as Legislative Counsel (working with key committees in Congress, developing legislative strategies, and producing in-depth analyses of proposed legislation) were parallel, in many respects, to O'Donnell's legislative activities. Spangler had performed these same functions as Legislative Counsel for the National Treasury Employees Union ("NTEU") for five years prior to being hired by the ADA in early 1991 (Pet. App. 3a, 44a; Oct. 24, 1995 Tr. 108-111, 116-18). In addition, at NTEU Spangler drafted testimony in support of legislation advocated by his members, and testified before Congress on several occasions (Oct. 24, 1995 Tr. 101-02).

Plaintiff, who was the ADA's Director of Federal Agency Relations, expressed some curiosity about the job when she heard O'Donnell might retire, though her duties focused on regulatory affairs, not legislation.[2] Nonetheless,

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[1] The other component of O'Donnell's job -- Director of the Council on Government Affairs and Federal Dental Services -- was a relatively small part of his job (25 percent of O'Donnell's total workload, at best). It largely involved organizational and administrative duties. (Pet. App. 3a, 43a; Oct. 23, 1995 Tr. 115, 125-26; Oct. 25, 1995 Tr. 58-59).

[2] When plaintiff applied to work for the ADA in 1988 as a lobbyist, she was deemed not qualified for the job but was offered the agency relations position because it was consistent with her background. Plaintiff's only work with legislation had been some 12 years earlier as an Attorney Advisor for the Department of Defense, a job in which legislative activities comprised 25 to 30 percent of her duties (Oct. 19, 1995 Tr. 106).

plaintiff met with O'Donnell in the late summer or early fall of 1992 to gain the benefit of his thoughts on the position. At that time she did not otherwise publicize her potential interest in the job or attempt to meet with any other ADA official to explore the matter further. At the time, plaintiff was not sure that she ultimately would want to apply for the job if O'Donnell retired (Oct. 18, 1995 Tr. 110-111; Oct. 19, 1995 Tr. 77-78, 84, 86; Oct. 25, 1995 Tr. 95).

Leonard Wheat was the Interim Director of the ADA's Washington office. He had directed plaintiff's work and had been her predecessor in the agency relations position. He had interviewed her for that job in 1988, and had recommended that she be hired (Oct. 18, 1995 Tr. 92; Oct. 23, 1995 Tr. 23-26). In October 1992, approximately one month after O'Donnell submitted his notice of retirement, plaintiff determined that she wished to apply for his job. She left a few notes telling Wheat that she wanted to meet with him, although she did not specify that the purpose of her meeting was to discuss her interest in the job. Wheat did not meet with her until about two weeks later (Oct. 19, 1995 Tr. 85-86).[3]

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[3] Plaintiff suggests that Wheat's inability to meet with her was part of a larger pattern of making himself available to "male employees in the office" but not to plaintiff (Pet. Br. 6). This assertion is at odds with the record. Dr. William Allen, the ADA's Assistant Executive Director, testified that he received complaints from men as well as from women about Wheat's unavailability (Oct. 23, 1995, Tr. 144). Thomas Spangler testified that he and others experienced frustration in trying to get Wheat's full attention: "oftentimes we were put off by [Wheat] – all of us were put off all the time. You have to be persistent ... I would make it a point to grab him in the parking lot, if necessary" (Oct. 25, 1995 Tr. 38). Judy Sherman, who agreed with Spangler and Allen that everyone had trouble getting Wheat's attention, nonetheless testified that as a lobbyist whose work was directed by Wheat, she regularly met with him

When plaintiff met with Wheat on October 30, 1992, and told him that she was interested in applying for the job, he was surprised at her interest, as plaintiff had focused on regulations and agencies during her tenure with the ADA. Her job as Director of Federal Agency Relations involved monitoring regulations for issues that might have an impact on the dental profession and patients, keeping groups within the ADA's organization apprised of their status, preparing responses to proposed regulations, and making contacts on these issues with officials and staff of federal agencies. The Legislative Director position, by contrast, required a thorough knowledge of the techniques for developing a legislative strategy, and for advocating the ADA's position before Congress (Oct. 19, 1995 Tr. 86; Oct. 23, 1995 Tr. 48, 63-64).

On November 20, 1992, the ADA advertised internally the opening for O'Donnell's position (JA-54).[4] Spangler and plaintiff applied. The ADA's Assistant Executive Director, Dr. William Allen, was responsible for making the selection (Oct. 23, 1995 Tr. 64-65).

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several times a day on legislative matters, albeit often in brief encounters due to Wheat's overburdened schedule (Oct. 25, 1995, Tr. 103-05).

[4] The notice regarding the position listed the following criteria for applicants:

> JD or LLB degree and at least 10 years experience in legislative advocacy/governmental affairs including a minimum of 3 years related experience with the Federal Government, preferably as a Congressional staff member, or with an association or as a legal/legislative representative for a political party; solid knowledge of the Federal system and legislative/regulatory process; strong oral/written communications skills.

Dr. Allen was very familiar with Spangler's and plaintiff's respective qualifications. From 1986 to 1988, Dr. Allen headed the Washington office, holding the dual position of Director of the office and Assistant Executive Director for Legislative Affairs. After nearly two years in Washington, in late 1988, Dr. Allen was asked to become the Assistant Executive Director in Chicago. At the same time, he was asked to maintain a significant presence in the Washington, D.C. office and to retain the position of Assistant Executive Director of Legislation. Thus, he was in Washington regularly (Oct. 19, 1995 Tr. 160; Oct. 23, 1995 Tr. 105-06, 112-14).

Wheat performed the formal interviews for O'Donnell's position and indicated on "applicant assessment forms" for plaintiff and Spangler that each met the minimum qualifications of the posting, although he indicated that Spangler was more qualified (JA-84 to JA-89).[5] Allen testified that in the second week of December of 1992, he met with plaintiff and Spangler for an informal discussion about the job (Oct. 23, 1995 Tr. 150-51), but plaintiff denied Allen met with her (Oct. 18, 1995 Tr. 127-28). Allen also

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[5] Plaintiff cites the court of appeals' panel decision for the proposition that Spangler failed to meet the posted job requirements, and further asserts that Wheat and Allen conceded the same at trial (Pet. Br. 5). In fact, Wheat's testimony on this point was not so stark as represented. Wheat testified that he believed Spangler to be eminently qualified because "Mr. Spangler had the necessary background, legal, legislative" (Oct. 20, 1995 Tr. 70). Allen testified that he also thought Spangler better qualified, but in his estimation, neither Spangler nor plaintiff met the precise written terms of the job posting (Oct. 23, 1995 Tr. 156). Spangler testified that he met the requirements of the job because "[a]t the time I applied for the position, I had ten-and-a-half years as an advocate in various capacities dealing with governmental agencies, whether it be as chief negotiator [for the NTEU] or whether it be as a lobbyist, and a variety of other functions" (Oct. 24, 1995 Tr. 131; *see also id.* 127-28).

consulted with O'Donnell to get his opinion about the candidates. O'Donnell recommended Spangler as better qualified (Oct. 25, 1995 Tr. 72-73). So, too, did lobbyist Judy Sherman, who asked Wheat to tell Allen that she thought Spangler should be selected for the position (Oct. 25, 1995 Tr. 108-09).[6] Allen chose Spangler for the job.

C. The Selection Process.

Plaintiff's account of the selection process omits mention of much of the evidence before the district court and jury.[7] She takes issue with Allen's manner of

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[6] Sherman relied on the Legislative Director to prepare testimony for the legislative matters assigned to her and believed, from her prior work with plaintiff and Spangler, that Spangler could produce persuasive writing and plaintiff could not (Oct. 25, 1995 Tr. 109).

[7] At the same time the ADA announced the Legislative Director job opening that is at issue in this case (JA-54), it also advertised two other, higher level jobs filled by female employees of the ADA (Pl. Trial Exh. 4, unredacted version in Joint Appendix filed with the *en banc* court of appeals at JA 166-68). Dr. Allen promoted one of the employees to the position of Director of State Government Affairs (Oct. 23, 1995 Tr. 145-46).

Plaintiff misleadingly claims widespread gender discrimination by the ADA, pointing to a so-called "census" of individuals who occupied "high level positions" which she says shows very few women in such jobs (Pet. Br. 5-6 n.6). What plaintiff fails to state is that "high level" jobs were defined at trial as level 9 through 14 (Oct. 19, 1995 Tr. 8-11). Females occupied 12 of the 18 jobs graded at level 10. Seven of 22 employees in level 9 were women (JA-48 to JA-51). Thus, there were far more women in "high level" positions than plaintiff represents.

communicating the decision to her (Pet. Br. 8). When Allen called plaintiff to give her the news, he did not tell her that she was not chosen because she was not considered as good a writer as Spangler or that he was more suited than she to perform the job. Rather, he emphasized her value to the ADA in her current position (Oct. 24, 1995 Tr. 7-8). Allen did not "abandon" these reasons in favor of new ones at trial, as plaintiff suggests. Instead, he testified that he presented the decision to plaintiff in this manner because he thought it "would be a cruel thing to do . . . to do a comparison [with the successful candidate] when you're telling somebody that they didn't get a position, and I think it's much kinder to try and emphasize the strong points that Mrs. Kolstad had, which was her job she was doing in the Federal Agency area" (Oct. 24, 1995 Tr. 8).

Plaintiff contends that Allen did not review her annual evaluations or written work product at the time he was making his decision (Pet. Br. 8-9). There is no dispute, however, that Allen had worked with plaintiff since 1988 and Spangler since 1991 and was familiar with the performance, skills, and abilities of both, and had reviewed plaintiff's written work (Oct. 23, 1995 Tr. 120-21; Oct. 24, 1995 Tr. 38-48). Also, he signed some of plaintiff's performance evaluations (JA-21, JA-29).

Plaintiff also faults Allen for his belief that she lacked legislative lobbying experience because, according to plaintiff, he failed to recognize that some 12 years earlier she had accompanied DOD officials to Capitol Hill to testify (Pet. Br. 9). Allen was not mistaken in this regard, however, for by plaintiff's own testimony, her duties at the DOD necessarily did not involve lobbying, as Executive Branch agencies are not permitted to lobby Congress (Oct. 19, 1995 Tr. 36).

Plaintiff makes much of the fact that Allen rewrote the Legislative Director job description by modifying the "most important responsibility" ("maintain[ing] liaison with federal agencies, bureaus, and Administration") to add the word "Congress" before "federal agencies" (Pet. Br. 8).[1] Plaintiff suggests that this was done merely to give Spangler an unfair advantage in competing for the job. What plaintiff does not mention is that she, herself, testified that when she saw the revised description for the Legislative Director job, her only surprise was that it emphasized regulatory activities at all: "...from observing what he [O'Donnell] did...there were a couple of things that were strange, that there was a lot of emphasis on regulatory issues, and he didn't -- Mr. O'Donnell had not done much of that." (Oct. 19, 1995 Tr. 76). Moreover, plaintiff did not dispute that after Spangler assumed the Legislative Director job, he was performing essentially the same duties as had been performed by O'Donnell (*id.* Tr. 77). Thus, while Allen did use excerpts of the Legislative Counsel job description to revise the Legislative Director description, what was added was language that simply reflected what the focus of the job already was.[2]

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[1] The Joint Appendix supplied to the Court does not contain the entire draft job description, including the above quoted portion. The full description, containing Allen's handwritten notations, can be found in the Joint Appendix filed with the *en banc* court of appeals (Pl. Tr. Exh. 3, *en banc* JA 158-165).

[2] There always had been overlap between O'Donnell's activities as Legislative Director and Spangler's as Legislative Counsel. Both analyzed prospective federal legislation of interest to the ADA and its members' patients, O'Donnell while tracking legislation, Spangler in conjunction with his duties in lobbying congressional committees with jurisdiction over those issues (Oct. 24, 1995 Tr. 109-11; Oct. 25, 1995 Tr. 50). Both drafted legislative summaries as part of their respective jobs (Oct. 24, 1995 Tr. 109, 116-117; Oct. 25, 1995 Tr. 50-51). O'Donnell recommended courses of action to be taken by the ADA's

Plaintiff and Spangler were employees in an office of fewer than 20 people and their strengths and weaknesses were well known by Allen (Oct. 23, 1995 Tr. 59, 113-14, 119-25). Furthermore, every witness besides plaintiff testified that they believed Spangler was more qualified than plaintiff was for the job (Oct. 23, 1995 Tr. 69-70 (Leonard Wheat); *id.* Tr. 154-55 (William Allen); Oct. 24, 1995 Tr. 86-87 (former General Counsel for Respondent, Mary Logan); Oct. 25, 1995 Tr. 72-73 (Jack O'Donnell); *id.* Tr. 108 (Judy Sherman)).[10] These were witnesses whom plaintiff had identified as most capable of assessing her and Spangler's respective qualifications (Oct. 19, 1995 Tr. 116).

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organization with respect to pending legislation, and Spangler developed legislative strategies to carry out the course of action chosen (*id.*).

[10] Plaintiff distorts the record with respect to Leonard Wheat's alleged use of the term "bitch" or "battleaxe" and telling of jokes (described by plaintiff as jokes about the "female anatomy") (Pet. Br. 6). As the court of appeals panel recognized, this testimony was contested (Pet. App. 48a) (no one except plaintiff so testified, and Wheat's description of jokes he told was being those one would hear on late-night television, Oct. 23, 1995 Tr. 40). Additionally, plaintiff herself could not remember any of the jokes allegedly told by Wheat, when they were told, or what aspects of the "female anatomy" were allegedly referenced in the jokes (Oct. 18, 1995 Tr. 121-23; Oct. 19, 1995 Tr. 65-66). She also testified that Wheat stopped telling her such jokes when she told him that she found them offensive (Oct. 19, 1995 Tr. 66-67). Furthermore, plaintiff's recollection of Wheat's alleged use of "bitch" or "battleaxe" amounted to allegations he used the words about two women who were not even employed in the ADA's Washington office (one was a non-employee of ADA); she did not testify that he used this term to describe plaintiff (Oct. 18, 1995 Tr. 120-22). Wheat conceded that he did, on occasion, express frustration when the staffs of members of Congress (including female staff members) blocked his access to the Congressional Representatives he was trying to contact because "if I can't present the argument, I can't do what I am supposed to do." (Oct. 23, 1995 Tr. 44).

D. The Decisions Below.

The case was tried to a jury. After the close of evidence, before the jury was instructed, the district court dismissed plaintiff's claim for punitive damages (Pet. App. 45a; JA-104). The jury found that the ADA discriminated against plaintiff on the basis of sex by selecting Spangler for the Legislative Director position (JA-110).

The ADA filed a post-trial motion to set aside the jury verdict. The district court issued a decision finding that "no direct evidence of sex-based motivation on the part of the ADA was presented" (Pet. App. 71a). The district court further found that the only circumstantial evidence favorable to the plaintiff was that the male had been "pre-selected" for the job (Pet. App. 71a-72a). There was nothing about the pre-selection, however, that was suggestive of gender-based discrimination (*id.*):

> What was missing, for present purposes, is evidence even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler. For aught that appears in this record their genders might have been reversed, or they of the same sex. That one was male, and the other female, is a mere fortuity. There is simply no basis, other than *post hoc ergo propter hoc* reasoning to relate Kolstad's rejection for the post to her gender: to wit, Kolstad is female; she was rejected in favor of a "pre-selected" male for a position for which she was qualified; *ergo*, the reason for the "pre-selection" must have been sex.

The district court ruled it was compelled by circuit precedent to allow the jury verdict to stand (Pet. App. 73a-74a). The court stated that the evidence was "insufficient to

prove *to the Court's satisfaction* that her sex or his more likely than not had anything to do with her rejection," and concluded: "Were it open to this Court to set aside the verdict under Fed. R. Civ. P. 50(c), however, this Court would do so" (Pet. App. 74a, emphasis in original).

The court of appeals panel affirmed the district court's failure to set aside the jury verdict (Pet. App. 46a-49a), but voted to reverse the dismissal of plaintiff's claim for punitive damages. The panel ruled that evidence sufficient to prove intentional discrimination is also sufficient to allow the jury to decide punitive damages (Pet. App. 49a-53a).

The ADA's suggestion for rehearing *en banc* was granted, limited to the issue of punitive damages (Pet. App. 75a-76a). The *en banc* decision of the court of appeals affirmed the district court's dismissal of the punitive damages claim (Pet. App. 22a). The court held that in order to recover punitive damages, there must be a showing of egregious conduct (Pet. App. 2a). It found no such evidence in this case (Pet. App. 20a-21a, footnote omitted):

> The evidence in this case does not show the kind of egregious discriminatory conduct necessary for the imposition of punitive damages. As the district court noted, 912 F.Supp. at 14-15 [Pet. App. 71a-72a], the jury's finding of discrimination appears to have been premised largely if not exclusively upon its apparent rejection, as mere pretext, of ADA's proffered rationales - that Kolstad's legislative experience and writing skills were inadequate. Whether such a rejection, by itself, is enough to support an award of *compensatory* damages is a question for a different *en banc* proceeding, see *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997), vacated pending rehearing *en banc*, 124 F.3d 1302 (D.C. Cir. 1997), but in this case it falls far short of supplying grounds for a punitive award.

The court of appeals also found that while evidence of pre-selection might permit an inference that the employer's proffered reasons for an employment decision were pretextual, "pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful" (Pet. App. 21a). It concluded that "pre-selection is relevant only insofar as it logically supports an inference of discriminatory intent, i.e., trivially at best" (Pet. App. 22a).

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991, § 102, 105 Stat. 1072, provides for the award of punitive damages under Title VII of the Civil Rights Act of 1964 in cases of intentional discrimination against nongovernmental entities, in addition to remedies already available under Title VII, and in addition to compensatory damages (for future pecuniary loss, pain and suffering, and for other nonpecuniary losses) "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Plaintiff Carole Kolstad's argument that all cases of intentional discrimination are eligible for jury consideration of punitive damages is inconsistent with the two-tiered structure of the Civil Rights Act of 1991, the common law nature of punitive damages, and the traditional roles of the court and the jury. Actions undertaken with malice or with

reckless indifference to federally protected rights necessarily involve egregious conduct, and it is the court's role to make the threshold determination of whether sufficient evidence exists for the jury to consider the award of punitive damages under the statutory standard.

The Act provides for two tiers of liability, one for basic liability and for compensatory damages, and the other for punitive damages available only if the plaintiff makes the additional showing under 42 U.S.C. § 1981a(b)(1). If the only check on the award of punitive damages were the jury's "discretionary moral judgment," as urged by plaintiff, that would "flatten" the two-tiered scheme of the statute in a manner unintended by Congress (Pet. App. 6a).

Plaintiff incorrectly argues that punitive damages depends only on the isolated mental state of the defendant. Evil motive (in the case of malice) or other requisite intent is a necessary but not sufficient ingredient for the award of punitive damages under Title VII, because "[t]he focus is on the character of the tortfeasor's conduct in imposing punitive damages." *Smith v. Wade*, 461 U.S. 30, 54 (1983). The type of conduct required for punitive damages is a "discriminatory practice" committed with "malice" or with "reckless indifference to the federally protected rights." Mental state cannot be separated from the conduct at issue under the statute. The conduct necessary to impose punitive damages must be egregious, as the very purpose of punitive damages awards is to punish a defendant "for his outrageous conduct and to deter him and others from similar conduct in the future." *Smith v. Wade*, *id.*, *quoting* Restatement (Second) of Torts § 908(1) (1979).

ARGUMENT

I. THE TWO-TIERED STRUCTURE OF THE ACT SUPPORTS DIFFERENTIATION BETWEEN THE BASIC LIABILITY STANDARD AND THE PUNITIVE DAMAGES STANDARD.

A. A Comparison Between the Compensatory and Punitive Damages Provisions in the 1991 Civil Rights Act Confirms the Two-Tiered Structure of the Act.

In the 1991 Civil Rights Act, Congress allowed for compensatory and punitive damages for violations of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 1981a. The structure of the Act provides for two tiers of culpability in cases of intentional discrimination, one for basic liability and compensatory damages, and the other for punitive damages.

The Act authorizes Title VII plaintiffs to recover punitive damages against an employer "who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of disparate impact)" where the plaintiff:

> demonstrates that [the employer] engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(a)(1) and (b)(1). By this language, the Act makes clear that the availability of punitive damages is limited to a specific subclass of cases: ones involving intentional discrimination but, more narrowly, ones in which

the plaintiff also demonstrates that the employer engaged in purposeful discrimination with "malice" or with "reckless indifference" to federally protected rights.

Whereas the predicate for both compensatory and punitive damages is "intentional discrimination," 42 U.S.C. § 1981a(a)(1), compensatory damages are available irrespective of any additional showing concerning the nature of the employer's actions or the mental state associated with those actions. The Act simply states that "the complaining party may recover compensatory damages" in Title VII cases of intentional discrimination "as allowed in subsection (b)." *Id.*

Subsection (b) is headed "Compensatory and punitive damages." No separate evidentiary standard of proof for compensatory damages is set forth. Rather, subsection (b) lists the types of compensatory damages recoverable ("future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"), § 1981a(b)(3), states that they are exclusive of economic damages otherwise recoverable under Title VII, § 1981a(b)(2), and places a cap on the total award for compensatory and punitive damages, § 1981a(b)(3).

By contrast, subsection (b) sets forth a separate evidentiary burden for punitive damages. Subsection (b)(1) is entitled "Determination of punitive damages." Under that provision, a complaining party may recover punitive damages if she "demonstrates" that the employer "engaged in a discriminatory practice or discriminatory practices" with "malice or with reckless indifference to the federally protected rights of an aggrieved individual."

The very structure of this provision shows that something more than proof of basic liability or the award of

compensatory damages is required. If no additional showing of culpability were required, the provision would not set forth separately what the plaintiff needed to "demonstrate[]" with regard to malicious or recklessly indifferent "discriminatory practices." Instead, the provision for punitive damages would be parallel to the provision for compensatory damages (which requires no additional showing), and would simply recite that punitive damages could be awarded in addition to compensatory damages, without a higher standard of proof. The statute requires more, and that is the most basic reason why plaintiff's argument that all cases involving intentional discrimination should go to the jury on punitive damages is inconsistent with the language of § 1981a.

The conclusion reached by the court of appeals flows from this structure of the Act (Pet. App. 5a):

> We think that by enacting a separate provision setting out a special standard for the imposition of punitive damages, Congress showed that it did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII. The structure of the statute -- one standard for basic liability, another for the exceptional remedy of punitive liability -- strongly suggests that, before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination.

B. The Award of Punitive Damages Under Title VII Depends on the Nature of the Discriminatory Conduct, Not Simply the Mental State of the Defendant.

Plaintiff incorrectly argues that the isolated mental state of the defendant is solely determinative on the issue of punitive damages under § 1981a, and that this result is required by a "literal" reading of the statute. In reality, plaintiff's position is that the words "reckless indifference" should be read in isolation from the rest of the words in the punitive damages provision. Indeed, plaintiff argues that the punitive damages standard is even further removed from the whole text, by parsing "reckless" and "indifference" apart from the rest of the words in the law.

ADA agrees that this case should be resolved on the basis of the language of the statute. But the entire provision, not just a piece of it, must be read in the context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843, 846 (1997); *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993); *King v. St. Vincent Hosp.*, 502 U.S. 215, 221 (1991). While the employer's mental state is an obvious essential ingredient in a violation committed with malice or with reckless indifference to federally protected rights, it is the discriminatory conduct associated with the mental state that is determinative. The Act requires the plaintiff to prove that the defendant (1) *acted* ("engaged in a discriminatory practice or discriminatory practices") (2) with malice or with reckless indifference to federally protected rights. The two cannot be separated. Otherwise, as plaintiff would have it, defendants would be punished unfairly for thoughts isolated from discriminatory actions. *Cf. Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) (personal animus as opposed to racial animus not

a basis for Title VII liability). That is not what the statute says.

Plaintiff barely mentions the "malice" prong of § 1981a in her brief, but the difference between malice and reckless indifference in the present context reinforces the statutory requirement not to separate the discriminatory conduct from the employee's mental state.

Malice means with evil motive or an actual intent to injure the plaintiff. *See, e.g., Smith v. Wade*, 461 U.S. 30, 48, 56 (1983). Reckless indifference entails more than negligence and less than malicious behavior with respect to the discriminatory conduct, a point not in dispute (*see* Pet. Br. 17). *See Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994) (recklessness has been equated with deliberate indifference; reckless disregard of substantial risk of serious harm is same as deliberate indifference to that risk; deliberate indifference is more than mere negligence, but less than acting for the very purpose of causing harm or with knowledge it will result). Malicious and reckless conduct are by definition egregious (*see* § II.A., *infra*).

If anything, the malice inquiry focuses more on mental state apart from conduct than does recklessness. Because evil motive or actual intent to harm indicating malice is by its nature egregious, there is no need to gauge the seriousness of the conduct separately from the mental state where malice is involved. For reckless indifference, another layer of analysis enters the picture, because the focus is more often than not on whether the defendant should have known (rather than actually knew) that it was acting in wanton disregard of federally protected rights. For recklessness the statute requires a sufficiently heightened state of conduct to demonstrate objective awareness of the wrongdoing (the "should have known" standard), one always

greater than is sufficient for basic liability. The more serious the conduct, the more likely it will cross the threshold from negligence to recklessness. The EEOC recognizes this principle: "The more blatant and outrageous the discrimination, the stronger the inference that the employer knew or should have been aware of the substantial risk that its behavior had crossed the line of legality." (Brief for the United States and the Equal Opportunity Commission as *Amici Curiae* ["EEOC Br."] at 11). Thus, the determination of recklessness, more than malice, depends upon the relationship between the mental state of the defendant and the degree of seriousness of the discriminatory conduct.

Plaintiff's *amici* suggest that punitive damages make up for small compensatory damages awards in some cases. The size of the compensatory damage award is irrelevant to the availability of punitive damages, save for the aggregate cap on compensatory and punitive damages under § 1981a. Small compensatory damages awards may serve to limit size of punitive damages awards under the "ratio" principle discussed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580-83 (1996). By the same token, higher punitive damages may be awarded for a "particularly egregious act" resulting in small economic damages, or for "particularly reprehensible conduct." *Id.* at 576, 582. In either case, it is the degree of the conduct that governs, not the isolated mental state of the defendant or the small size of the compensatory award.

C. The Ability to Establish Liability Based on Circumstantial Evidence and Judicial Presumptions Reinforces the Two-Tiered Structure of the Statute.

Many cases of intentional discrimination under Title VII are proven by the familiar three step sequence of proof (*prima facie* case, proffer of non-discriminatory reason, and pretext) set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). The majority of the courts of appeals allow the plaintiff to prevail upon the showing of what has been labeled "pretext only," which essentially means that discrimination may be proved inferentially by a showing that the employer's tendered non-discriminatory reasons are false or unbelievable.[11]

Even assuming that the requirements of Title VII are met when liability is established on the basis of "pretext only," such proof of intentional discrimination entirely on the basis of inferences and judicial presumptions may say

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[11] The courts of appeals for six circuits, the Third (*en banc*), Sixth, Seventh, Ninth, Tenth (*en banc*), and District of Columbia (*en banc*), hold that evidence of pretext is ordinarily sufficient to permit the trier of fact to find discrimination. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1292 (D.C. Cir. 1998) (summary judgment) (*en banc*); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-72 (3d Cir. 1996) (*en banc*) (judgment as a matter of law), *cert. denied*, 117 S. Ct. 2532 (1997); *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 343-47 (6th Cir. 1997) (bench trial); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) (summary judgment); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998) (summary judgment); *Washington v. Garrett*, 10 F.3d 1421, 1432-33 (9th Cir. 1993) (summary judgment); *Randle v. City of Aurora*, 69 F.3d 441, 451-53 (10th Cir. 1995) (*en banc*) (summary judgment).

nothing about the state of mind of the defendants, in either a subjective or objective fashion.

Similarly, employers can be held liable under Title VII on the basis of constructive knowledge flowing from negligence, as opposed to willful blindness. *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996). It is undisputed that mere negligence is not sufficient to trigger punitive damages under the recklessness standard (Pet. Br. 17).

The ability to prove "intentional discrimination" either without reference to the actual state of mind of the defendant or by mere reference to a negligent constructive knowledge reinforces the two-tiered structure of the Act and the separation between the basic liability standard and the standard for punitive damages. Submission of every case of intentional discrimination to the jury for consideration of punitive damages truly would "flatten that scheme" (Pet. App. 6a). Plaintiff's approach "virtually obliterates any distinction between" cases involving proof of liability through pretext alone and the heightened standard of proof required for punitive damages. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-133 (1988). Flattening of the statutory scheme, as proposed by plaintiff, would increase the federal courts' staggering workload of employment discrimination cases, place meritorious claims in danger "of being lost in a sea of meritless suits," and serve no purpose other than as a "bounty" for private litigation. *Smith v. Wade*, 461 U.S. at 91 (Rehnquist, J., dissenting).

D. The Case Law Confirms the Two-Tiered Nature of the Statute, by Reference to the Type of Conduct Required to Impose Punitive Damages.

The decisions of this Court and the courts of appeals overwhelmingly recognize that a heightened state of conduct is required for the imposition of punitive damages, and state directly or by implication that the defendant's mental state is not alone sufficient to impose punitive damages. In *Smith v. Wade*, this Court emphasized that the "focus is on the character of the tort feasor's conduct in imposing punitive damages." 461 U.S. at 54. This Court referred to recklessness as the "usual threshold for punitive damages," *id.* at 53, and quoted the Restatement (Second) of Torts § 908 in stating that the purpose of punitive damages is to punish the defendant for "outrageous conduct." *Id.* at 54. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages "by definition" are intended to punish the tortfeasor and deter him and others from "similar extreme conduct"); *see also BMW v. Gore*, 517 U.S. at 579 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award").

The decisions of the courts of appeals also uphold the two-tiered culpability structure of the Act by reference to the type of conduct necessary for punitive damages. For example, the Ninth Circuit requires "plaintiffs seeking punitive damages under Title VII to make a showing beyond the level of intentional discrimination required for compensatory damages." *Ngo v. Reno Hilton Resort Corp.*, 156 F.3d 988, *amending* 140 F.3d 1299, 1304 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec.

18, 1998) (No. 98-999). In like manner, the Seventh Circuit has held under Title VII that "[p]unitive damages requires more" and presents a "higher hurdle than merely proving the underlying unlawful discrimination." *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996); *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1132-33 (7th Cir. 1997) (plaintiff "must go beyond proving" intentional discrimination to obtain punitive damages). As recapitulated by the court of appeals (Pet. App. 19a-20a, footnote omitted):

> We note in conclusion that our decision today aligns us with all but one of the several circuit courts to address this question. See *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996) (endorsing concept of a higher standard for punitive damages under § 1981a, and noting that such damages "are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future"); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997)(holding that under § 1981a, "[p]unitive damages are an extraordinary remedy, to be reserved for egregious cases," and "are not an element of recovery in every case involving an intentional tort") (citation omitted); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (despite sufficiency of evidence of liability and "duplicitous" actions of defendant's employees, evidence held insufficient for punitive damages); *Emmel v. Coca-Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996) (characterizing standard for punitive damages as a "higher hurdle" than

> that for proving the underlying discrimination); *Karcher v. Emerson Electric Co.*, 94 F.3d 502, 509 (8th Cir. 1996) (although jury could properly infer intentional sex discrimination from inconsistent nature of hiring process and failure to select and train women, it could not find malice or deliberate indifference); *Ngo v. Reno Hilton Resort Corp.*, 1998 WL 162166 (9th Cir. Apr. 9, 1998) (requiring "evidence of conduct more egregious than intentional discrimination to support an award of punitive damages in Title VII cases"); but see *Luciano v. Olsten Corp.*, 110 F.3d 210, 219-20 (2d Cir. 1997) (finding that no additional evidence is required for punitive liability).[12]

E. The Two-Tiered Standard of the Statute is Consistent with Prior Decisions of This Court.

1. *Smith v. Wade.*

Plaintiff is incorrect in arguing that *Smith v. Wade* allows for the imposition of punitive damages on the basis of the same conduct minimally necessary to impose liability. In *Smith v. Wade*, the "sufficiently serious misconduct" on the defendant's part was the same for both compensatory and punitive damages, because the standard for compensatory

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[12] In addition, *see Farpella-Crosby v. Horizon Health Corp.*, 97 F.3d 803, 810 (5th Cir. 1996) (vacating punitive damage award while upholding finding of intentional discrimination); *Splunge*, 97 F.3d at 491 (same); *Browning v. President Riverboat Casino-Missouri*, 139 F.3d 631, 637 (8th Cir. 1998) ("§ 1981a requires a showing of more than intentional discrimination to recover punitive damages").

liability in that case was "as high as or higher than the usual threshold for punitive damages." 461 U.S. at 52, 53. As explained by the court of appeals, "while the criterion adopted by the Court for punitive damages was not egregious in relation to the applicable compensatory standard, it clearly was so in relation to ordinary tortious conduct" (Pet. App. 11a). The court concluded (*id.*): "Thus the decision in *Smith v. Wade* supports rather than refutes the idea that some form of egregiousness is essential for punitive damages."[13]

It is clear from the discussion in *Smith v. Wade*, 461 U.S. at 50-54, that the same threshold for liability and punitive damages occurs only in those causes of action -- such as malicious prosecution, intentional infliction of emotional distress, defamation of a public figure, or a constitutional violation of the type at issue in *Smith v. Wade* -- where the standard for compensatory liability is high. In no instance is there a single-tier structure for liability and punitive damages where the threshold for liability is as low as it can be in a Title VII case.

2. *The ADEA Cases.*

Plaintiff relies extensively on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), a case under the Age Discrimination in Employment Act (ADEA). *Hazen Paper* construed the "willfulness" provision in the ADEA to

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[13] Plaintiff misleadingly argues (Pet. Br. 43) that the court of appeals held that punitive damages under Title VII could only be awarded for discriminatory conduct "equivalen[t]" to such barbaric physical abuse as in *Smith v. Wade*. The Court's reference to the jury instruction in *Smith v. Wade* (Pet. App. 11a) clearly was for the purpose of illustrating that the liability standard in *Smith v. Wade* was "egregious" in relation to ordinary tortious conduct, not for the purpose of equating the *Smith v. Wade* jury instruction with the Title VII standard for punitive damages.

determine whether it included a requirement of outrageousness. The Court had previously decided, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985), that liquidated (double) damages were not warranted under the ADEA's willfulness provision where the defendant neither "knew [nor] showed reckless disregard for the matter of whether" its policy violated the statute.

In *Hazen Paper*, the court reaffirmed the *Thurston* definition of "willful," and stated that, "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous...." 507 U.S. at 617.

Although the Court in *Thurston* had observed that liquidated damages under the ADEA are "punitive in nature," 469 U.S. at 125, the additional amounts owing for willful violations of the ADEA are denominated "liquidated damages," not punitive damages. 29 U.S.C. § 626(b), incorporating 29 U.S.C. § 216(b). The other obvious difference was highlighted by the court of appeals in this case (Pet. App. 15a): "To begin with, the relevant language is different: the ADEA requires 'willful' conduct, not 'malice' or 'reckless indifference'."

Moreover, though this Court rejected an additional requirement for outrageousness on top of the *Thurston* "willfulness" standard, it did not jettison the two-tiered liability principle of *Thurston*: "we continue to believe that the 'knowledge or reckless disregard' standard will create two tiers of liability across the range of ADEA cases." 507 U.S. at 616. There is no suggestion in either *Thurston* or *Hazen Paper* that evidence sufficient to impose liability will

always require submission of the liquidated damages issue to the jury.[14]

II. THE STATUTORY STANDARD FOR PUNITIVE DAMAGES INCLUDES THE ELEMENT OF EGREGIOUSNESS OR OUTRAGEOUSNESS DERIVED FROM COMMON LAW.

A. Egregiousness And Malice/Recklessness Are Not Mutually Exclusive; Malice And Recklessness Are By Definition Egregious.

Plaintiff endlessly repeats the argument that the court of appeals has added words to the statute by holding that egregious conduct is required for the imposition of punitive damages. Because plaintiff has blindly parsed "reckless" and "indifference" without reference to the conduct ("discriminatory practices") by which punitive damages are to be judged, plaintiff and her *amici* miss the central point: punitive damages "by definition" encompass "extreme conduct." *City of Newport*, 453 U.S. at 266-67.

The court in *Hernandez-Tirado v. Artau*, 874 F.2d 866 (1st Cir. 1989), similarly recognized that punitive damages by definition entail outrageous conduct. The court noted that this Court specifically focuses the punitive damages inquiry "on the character of the tort feasor's conduct," and that punitive damages "require conduct that is 'outrageous', either because of the person's 'evil motive' or

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[14] The formulation "more likely knows its conduct is illegal," in *Hazen Paper*, 507 U.S. at 617, relied upon by plaintiff, may be a useful shorthand formulation of the test for a willful violation of the ADEA, but by itself does not state the complete or accurate test for reckless indifference of federally protective rights under the Civil Rights Act of 1991.

because of his 'reckless indifference' to the rights of others." 874 F.2d at 869, *quoting Smith v. Wade*, 461 U.S. at 54, 56.

The EEOC comes close to accepting the simple truth that egregiousness and recklessness are part of an equation, rather than a sum. In referring to statements in Congress suggesting that punitive damages will be awarded only in egregious cases, the EEOC states (EEOC Br. 23):

> The word "egregious," however, is commonly used as shorthand for "more culpable" conduct. Such usage would be perfectly consistent with the statutory text as enacted, if the references to "egregious" refer to the culpability that results from acting with malice or reckless disregard of another's rights. Indeed, the Restatement of Torts uses the word "outrageous" in precisely this manner.

The EEOC concludes that the "better reading of those legislative comments is simply that Members of Congress considered any conduct in violation of the statutory 'malice or reckless indifference' standard to be, by definition, egregious" (*id.*).

Construing the statute in this manner, by equating recklessness and egregiousness and by doing so with reference to defendant's conduct instead of an isolated mental state, is in harmony with the decision of the court of appeals. It preserves two-tiered liability without the claimed additions to the statute. It also explains, contrary to plaintiff's argument, why the need for egregious conduct is wholly consistent with a "literal" reading of the statute.

B. Congress Intended for Egregious Conduct To Be a Necessary Element of Punitive Damages, As Derived From Common Law.

This Court has issued caution concerning the extent of the utility of the legislative history of the 1991 Civil Rights Act because of its ample dosage of "frankly partisan statements." *Landgraf v. USI Film Products*, 511 U.S. 244, 262 (1994). Legislative history and the principles of statutory construction, however, confirm the appropriateness of equating the statutory standard of maliciousness and recklessness with egregiousness under common law principles, confirm the two-tiered framework of the statute, and necessarily reject plaintiff's argument that every case of intentional discrimination can result in an award of punitive damages.

First, plaintiff ignores the fundamental principle of statutory construction that when Congress uses a term that has been applied at common law, the term has the same meaning as in common law. As this Court stated in *Molzof v. United States*, 502 U.S. 301, 307 (1992), *quoting Morissette v. United States*, 342 U.S. 246, 263 (1952):

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

See United States v. Shabani, 513 U.S. 10, 13 (1994) ("settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms").

In *Molzof*, this Court construed 28 U.S.C. § 2674, the Federal Tort Claims Act provision excluding the award of punitive damages against the United States. This Court recognized that punitive damages is a "legal term of art that has a widely accepted common-law meaning," and is a concept "deeply rooted in the common law." 502 U.S. at 306, 311. The Court stated that the common law definition of punitive damages "focuses on the nature of the defendant's conduct," and agreed with the characterization that punitive damages are those "intended to act as punishment for egregious conduct." *Id.* at 307, 305-06.

The Restatement (Second) of Torts, quoted in *Smith v. Wade*, 461 U.S. at 46-48, recaps the common law standard in a manner that parallels the language of the Act: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* at § 908(2). Comment b to § 908 similarly states: "since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate -- which is to say, conduct involving some element of outrage similar to that usually found in crime."

The EEOC (EEOC Br. 20 n. 15) argues alternatively that the punitive damages standard in § 1981a represents a departure from the common law. The necessary implication of this argument is that Congress called the remedy punitive damages but really meant to establish a lesser form of

remedy. As concurring Judge Randolph wrote, such a result could only be "the product of a very clever draftsman, someone who wanted to convey the appearance of limiting punitive damages to exceptional cases, while hoping that courts would draw upon other legal sources to find the limitation an illusion" (Pet. App. 23a). Judge Randolph correctly concluded otherwise, stating that "[t]hose who voted for this legislation surely must have believed they were voting for a two-tiered damages system," intending "punitive damages to be reserved for only the worst cases" (*id.*).

Second, as noted by the court of appeals (Pet. App. 6a-7a), the legislative history of the Civil Rights Act of 1991 supports the two-tiered nature of the statute. The House Report states:

> Plaintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages.

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. at 72.

Third, the caselaw supports this reading of punitive damages, borne of the common law. In addition to the cases cited by the court of appeals recognizing that egregious conduct is necessary for the imposition of punitive damages under 42 U.S.C. § 1981a (Pet. App. 19a-20a, quoted in § I.D., *supra*), the court of appeals also referred to cases which read *Smith v. Wade* as requiring the legal standard of egregiousness to be met in cases under 42 U.S.C. § 1983 (Pet. App. 14a-15a). *See also Barber v. Nabors Drilling U.S.A. Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (plain error

to submit punitive damages to jury under § 1981a where record devoid of evidence of malice or recklessness).

III. SUBMISSION OF PUNITIVE DAMAGES CLAIMS TO THE JURY IN ALL CASES IN WHICH THERE IS SUFFICIENT EVIDENCE TO SUPPORT A LIABILITY FINDING WOULD USURP THE ROLE OF THE COURT.

A. The Traditional Role of the Court Must be Preserved in Cases Involving Claims for Punitive Damages.

By arguing that all Title VII cases of intentional discrimination with sufficient evidence to go to the jury on basic liability should also be submitted to the jury on punitive damages, plaintiff crafts a special rule warranted neither by the statute nor by precedent. The court of appeals correctly concluded that there is no basis for plaintiff's argument "to deny the court's traditional role in deciding whether a reasonable juror could find the defendant's conduct sufficiently egregious for the punitive damages issue to be submitted to the jury in the first instance" (Pet. App. 14a).

The general principle announced by the Court in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943) (citations omitted) still pertains:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by

> judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

The preservation of the traditional role of the trial court in determining whether there is sufficient evidence to go to the jury applies in employment discrimination cases involving punitive damages, the same as in other areas of the law. *See Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997); *Fisher v. Vassar College*, 114 F.3d 1332, 1346-47 (2d Cir. 1997) (*en banc*); *see also Jackson v. Bunge Corp.*, 40 F.3d 239, 246-47 (7th Cir. 1994) ("while the measurement of punitive damages is a jury question, the preliminary question of whether the facts of a particular case justify the imposition of a punitive damages award is properly one of law"). As stated by the Fourth Circuit in *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 306 (4th Cir. 1998), *quoting Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489-90 (4th Cir. 1988), *cert. denied*, 488 U.S. 996 (1988), "[a]though any form of discrimination constitutes reprehensible and abhorrent conduct, not every lawsuit...calls for submission of this extraordinary remedy to a jury."

Plaintiff argues that the jury serves as a check upon itself, retaining "discretionary moral judgment" over whether or not to render an award of punitive damages in any given case. The court of appeals correctly disposed of this argument by noting that the reference to "discretionary moral judgment" in *Smith v. Wade*, 461 U.S. at 52, "simply restates the commonplace that the jury can choose *not* to award them even when the evidence is sufficient to give it the choice" (Pet. App. 13a).

The court of appeals was also correct in concluding that, in enacting the punitive damages standard in the Act, Congress was doing more than merely drafting jury instructions for the jury to apply in its "unchecked discretion" (Pet. App. 15a). By establishing an "even higher standard" than basic liability the plaintiff "must meet" to get punitive damages, Congress was not advocating "simply a verbal formulation to be pondered by juries with no role for the trial court" (*id.*).

B. The Examples of the Extremely Narrow Range of Cases That Plaintiff Would Exempt from Jury Consideration Do Not Furnish a Basis for Submitting All Cases of Intentional Discrimination to the Jury On the Issue of Punitive Damages.

In an attempt to avoid an appearance of overreaching, plaintiff relies on what the court of appeals termed a "mistake-of-law defense" (Pet. App. 16a) to show that not all cases warranting compensatory damages would also be candidates for punitive damages. The mistake of law defense is drawn from the discussion in the dissent below regarding good faith efforts to comply with the law or a good faith assertion of a "bona fide occupational qualification" (BFOQ) defense (Pet. App. 29a-31a). In this Court, plaintiff attempts to expand the argument by referring to "statutory exemptions" and other coverage contours of the federal civil rights laws, with the conclusion that an employer might reasonably believe it was complying with the law (and thus was not recklessly indifferent to federally protected rights) but nonetheless violated the law's substantive provisions.

There is nothing in the statute or in the legislative history to indicate that Congress carved out a narrow path

under mistake-of-law in order to preserve a meaningful distinction between cases eligible and ineligible for punitive damages. Although plaintiff takes issue with the court of appeals' discussion about the limited availability of BFOQ defenses in Title VII cases, she cannot seriously dispute that the "class of disparate treatment cases that could escape exposure to punitive damages on the dissent's theory is small, perhaps vanishingly so" (Pet. App. 17a).

The correct approach is not to find a narrow band of cases that would be exempt from punitive damages, but rather to apply the statute in a straightforward fashion. This starts with the recognition that punitive damages, as rooted in the common law, require extreme or egregious conduct that forms the discriminatory practice. As recognized by the EEOC (EEOC Br. 11), the degree of the conduct will guide the court in determining whether the employer has crossed the threshold of reckless indifference.

IV. THE LOWER COURTS SHOULD IMPLEMENT THE STATUTORY STANDARD FOR PUNITIVE DAMAGES ON A CASE-BY-CASE BASIS.

Under the above principles, the lower courts should proceed on a case-by-case basis to determine whether, in cases of intentional discrimination under Title VII, there is sufficient evidence of malice or whether the conduct is of a sufficiently egregious character to signify that the employer was recklessly indifferent to the federally protected rights of the plaintiff. Under the statute, it is up to the court, not the jury, to determine in the first instance whether there is "not enough evidence" to support a punitive damages award. *Splunge*, 97 F.3d at 491; *see Barber*, 130 F.3d at 710; *Ngo*, 140 F.3d at 1304; *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1692 (U.S. May 12, 1997), 117 S.Ct. 1693 (U.S. May 12, 1997).

Plaintiff recognizes that the determination of eligibility for punitive damages in a Title VII case is "fact-specific" (Pet. Br. 36). Although plaintiff errs in arguing that the trial court should not perform its traditional function of adjudging the sufficiency of the evidence at the threshold of the punitive damages determination, plaintiff is correct in implying that the determination must be made on a case-by-case basis.

The court of appeals suggested that there were certain types of cases that would likely reach the jury on the issue of punitive damages. Examples provided by the court included evidence showing that the defendant engaged in a pervasive pattern of discriminatory acts,[15] or manifested genuine spite and malevolence, or otherwise evinced a "criminal indifference to civil obligations." Pet. App. 13a, *citing Smith v. Wade*, 461 U.S. at 41. These are useful examples, but there should be no *per se* rules defining classes of cases in which it is automatically assumed that

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[15] There was no such evidence in this case. Misplaced is plaintiff's reliance on an expired consent decree which settled a lawsuit between the ADA and a class of women in the early 1980s, and which contained a provision prohibiting pre-selection during the term of the decree (Pet. Br. 11-12). The decree expired more than a year before the decision at issue. It contained a non-admissions clause stating "The ADA denies that it has engaged in any policies, acts, or practices that discriminate against women employees. Nothing in this consent decree shall be construed in any way as an admission of liability on the part of the ADA" (Pl. Proposed Trial Exh. 24A, En Banc JA 316). Finally, it did not identify pre-selection as illegal, only as contrary to Respondent's then-existing policy (JA-16 to JA-17). Contrary to plaintiff's characterization (Pet. Br. 12), the court of appeals panel concluded that the district court did not abuse its discretion in excluding the consent decree under Fed. R. Evid. 403, and stated that "we express no opinion on whether, or in what circumstances, the consent decree might now be admissible as evidence to support Kolstad's claim for punitive damages" (Pet. App. 53a).

punitive damages will lie. Each case will depend on the context of the evidence and all the facts and circumstances of the case.[16] For example, as explained in Comment a, Section 500 of the Restatement (Second) of Torts, Reckless Disregard of Safety, the reasonableness of a course of conduct ordinarily involving a high degree of risk of serious harm to others may be altered by the circumstances: driving through heavy traffic at a high rate of speed is ordinarily reckless, but is not so if the driver is transporting a seriously injured person to the hospital emergency room.

Once the trial court has made the threshold determination as to whether there is sufficient evidence of egregious conduct under the standard of malice or reckless indifference to federally protected rights, it can place the issue before the jury in an appropriate case in a straightforward manner, without technical language describing applicable legal principles. *See Gehring v. Case Corp.*, 43 F.3d 340, 343-44 (7th Cir. 1994) ("Good instructions use simple words in short, concrete sentences."). One option not available to the district courts, however, is to place the issue in the hands of the jury without determining in the first instance whether the threshold requirements for malice or reckless indifference to federally

[16] Although some decisions have referred to the involvement of higher management as a basis for the submission of punitive damages to the jury, *e.g.*, *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575 (8th Cir. 1997), *appeal after remand*, 124 F.3d 208 (1997), a hard and fast rule would be unfairly prejudicial to small employers who are more likely to have involvement in employment decisions by owners or other "top level" managers. Similarly, as explained by the court of appeals, "where the selection is to be made from among a narrow band of current employees well-known to the selectors, it is hard to see how there could not be a substantial degree of pre-selection -- unless the decision-makers were asleep at the switch or the candidates' track records were virtually identical" (Pet. App. 21a).

protected rights have been met. Intentional discrimination, without more, is not enough.[17]

V. THE DISTRICT COURT CORRECTLY APPLIED THE STATUTORY STANDARD BY NOT SUBMITTING THE PUNITIVE DAMAGES ISSUE TO THE JURY.

The record supports the district court's decision to withhold the issue of punitive damages from the jury, irrespective of the punitive damages standard articulated by this Court (other than adoption of plaintiff's proposal to submit every case of intentional discrimination to the jury).[18] In the district court's view, the evidence was not "even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler" (Pet. App. 71a). Thus, the conduct at issue was certainly not of a sufficiently egregious character to signify that the ADA was recklessly indifferent to the federally protected rights of plaintiff; neither was there sufficient evidence of malice to support a punitive damages award.

Plaintiff's evidence of sex discrimination boils down to the following allegations: (1) she was passed over for promotion in favor of a man, Spangler; (2) Spangler was pre-selected for the promotion; (3) Wheat, who had input

[17] The instruction tendered by plaintiff would have erroneously allowed the jury to equate intentional discrimination alone with the statutory standard required for punitive damages: "Evidence that the defendant intentionally violated plaintiff's civil rights will support an award of punitive damages if you, as the jury, find that the conduct merits a punitive award" (JA-102).

[18] The decision below may be affirmed on different grounds. *See Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996); *Fay v. Noia*, 372 U.S. 391, 398 (1963).

into the selection decision, used the word "bitch" or "battleaxe" in the past to refer to two "prominent professional women" (Pet. App. 4a); and (4) Wheat also had told unspecified jokes referring to unspecified women's body parts (Oct. 18, 1995 Tr. 120-24).

Allegations of pre-selection are not dispositive of discrimination under Title VII, and *a fortiori* do not suffice to state a punitive damages claim. *See, e.g., Odom v. Frank*, 3 F.3d 839, 850 (5th Cir. 1993) (fact that decisionmakers have determined in advance who will fill a job does not amount to illegal discrimination); *Kennedy v. Landon*, 598 F.2d 337, 341 (4th Cir. 1979) (although pre-selection might violate employer's own rules, "it does not evidence the type of discrimination that is prohibited by Title VII"); *Blue v. Widnall, to be reported at* 162 F.3d 541, 1998 WL 832123 *5 (9th Cir. 1998) (plaintiff "failed to present evidence that any preselection resulted from a discriminatory motive instead of political considerations").

Wheat had significant input into the promotion decision (he ranked both candidates as meeting the minimum qualifications of the posting, but indicated that Spangler was more qualified), but Allen held responsibility for the final decision (Oct. 23, 1995 Tr. 64-65).[19] Unlike the committee

[19] Although the dissent below urged that the selection process might be considered a "sham" (Pet. App. 38a) in part because Dr. Allen used Spangler's Legislative Counsel job description to update the description for O'Donnell's job, there was "no evidence that the job has not in fact included those elements" (Pet. App. 3a). Plaintiff herself expressed surprise that O'Donnell's job description emphasized regulatory activity that he "had not done much of" (Oct. 19, 1995 Tr. 76), and she conceded that Spangler actually carried out these duties in succeeding O'Donnell (*id.* 77). If punitive damages were available under these facts, employers, particularly small employers, would be forever hamstrung in consolidating jobs or job requirements, for fear they might

which decided to terminate the plaintiff in *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990), *cited in Burlington Indus., Inc. v. Ellerth*, 118 S.Ct. 2257 (1998) (*see* Pet. Br. 46), Allen did not simply act as a "cat's paw" for Wheat's assessment of the plaintiff. Here, Allen received the opinions of Jack O'Donnell and Judy Sherman, as well as the opinion of Wheat, that Spangler was better qualified than the plaintiff for the promotion (Oct. 25, 1995 Tr. 72-73). Allen also utilized his personal knowledge of Spangler's and plaintiff's respective qualifications in reaching his decision to promote Spangler (Oct. 19, 1995 Tr. 160; Oct. 23, 1995 Tr. 105-06, 112-13). Thus, Allen did not simply act as a conduit for an allegedly discriminatory recommendation by Wheat.[20]

Plaintiff points to the message delivered by Dr. Allen to plaintiff after he selected Spangler for the job as probative of discrimination. Although the panel of the court of appeals found that the ADA's asserted nondiscriminatory reasons for choosing Spangler over plaintiff (that plaintiff lacked recent legislative experience and strong writing skills) could be viewed as pretexts "unworthy of belief" (Pet. 48a), these facts do not furnish a basis for imposing punitive damages, even assuming Dr. Allen was not frank with plaintiff in telling her the reasons she was not selected. In *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996), the court upheld a Title VII judgment for back pay and

be subject to a punitive damages claim of "preselection."

[20] By contrast, the *Shager* court noted that the biased supervisor's influence in setting the plaintiff up to fail by portraying his performance to the committee "in the worst possible light," "may well have been decisive" in the committee's decision to fire the plaintiff. 913 F.2d at 405. The committee's deliberations on the plaintiff's termination were brief, and no member could even remember having considered the issue. *Id.*

compensatory damages of an employee fired in connection with a controversy precipitated by her contemplation of an abortion. The court reversed the award of punitive damages, however, stating "although the actions of Holland Hospitality's employees were duplicitous and disclosed a lack of empathy, they did not rise to the level to support a punitive damages award under the Civil Rights Act of 1991." 85 F.3d at 1216.

Allen's role as the decisionmaker diminishes the significance of plaintiff's testimony that Wheat used "bitch" or "battleaxe" to refer to two other women not employed in the ADA's Washington office and made unspecified off-color jokes. However, even if Wheat's assessment had played a larger role in Allen's promotion decision, these allegations are weak support of sex discrimination at best, and certainly do not signify malice or reckless indifference.

Wheat did not refer to plaintiff herself in a derogatory manner, and his comments were unrelated to her application for the promotion. Thus, such comments are not supportive of a basic liability finding, let alone a punitive damages award. *See McCarthy v. Kemper Life Ins. Co.*, 924 F.2d 683, 686-87 (7th Cir. 1991), *quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 1804 (1989) (unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of discrimination); *Neuren v. Adduci, Mastriani, Meeks, & Schill*, 43 F.3d 1507, 1513 (D.C. Cir. 1995) (supervisor's written evaluation of the plaintiff, referring to her as a "bitch," may have been inappropriately phrased, but was not in itself an indication of sex discrimination; rather, it was grounded in gender-neutral concerns about her relations with co-workers); *Williams v. KETV TV, Inc.*, 26 F.3d 1439, 1441 n.2 (8th Cir. 1994) (affirming judgment for employer on sex and race discrimination despite evidence at

trial that personnel involved in hiring decision referred to plaintiff as a "black bitch"); *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 329 (1st Cir. 1996) (noting that allegedly discriminatory statement did not mention the plaintiff and provided insufficient basis for an inference that the plaintiff was not offered the position he wanted because of his age); *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1266 (7th Cir. 1993) (a supervisor's occasional or sporadic use of a slur directed at an employee's race, ethnicity, or national origin, when unrelated to the decisional process, is insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decisionmaker).

Moreover, plaintiff's inability to relay the substance of the supposedly offensive jokes made by Wheat severely undermines their potency as evidence of sex bias or motive. In *Santiago v. Canon U.S.A., Inc.* 138 F.3d 1, 5-6 (1st Cir. 1998), the plaintiff alleged that company representatives uttered "derogatory epithets denigrating [Santiago's] dignity as a woman and as a human being." But plaintiff did not specify the substance of the epithets, and the court found that her subjective perception of the statements could not demonstrate discriminatory intent.

This case does not present a close question on whether punitive damages should have been available. Indeed, had the district court judge not felt bound by circuit precedent to uphold the jury verdict, plaintiff would not have prevailed on liability on the evidence of preselection, "the only circumstantial evidence presented favorable to the plaintiff" (Pet. App. 71a). Plaintiff did not prove "*to the [district] Court's satisfaction* that her sex...had anything to do with her rejection" (Pet. App. 74a). As the court of appeals pointed out, "pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful" (Pet.

App. 21a). The preselection evidence inferentially supported a finding of discriminatory intent "trivially at best" (Pet. App. 22a). In sum, the evidence presented by plaintiff "fails to show egregiousness in any form" (Pet. App. 13a).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals on the issue of punitive damages should be affirmed.

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Respectfully submitted,

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APPENDIX

42 U.S.C. § 1981a states:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil Rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5 or 42 U.S.C. 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3 or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)], from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5 or 2000e-16](as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29

and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C. 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)], from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)], or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20

or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means--

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VIII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)[42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

(17)

Supreme Court, U.S.
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No. 98-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Section 1981a authorizes an award of punitive damages on either of two distinct showings, proof of reckless indifference to federally protected rights or a demonstration of malice. Because petitioner would on remand seek an award of punitive damages on alternative grounds, we urge the Court to address the legal standard applicable to each, and we discuss those issues separately below.

We do not contend that the existing finding of intentional discrimination in this case entitles petitioner as a matter of law to an award of punitive damages; whether such damages should be awarded remains a question for the jury, which would be free to deny that remedy despite the proven discrimination. We urge only that petitioner is entitled to have a jury consider her claim for punitive damages under both of the two grounds set out in the statute.

I. THE RECKLESS INDIFFERENCE PROVISION OF SECTION 1981A(B)(1) SHOULD BE INTERPRETED LITERALLY TO REFER TO THE MENTAL STATE OF THE DISCRIMINATORY OFFICIAL

(1) *Respondent Has Failed to Articulate A Clear Alternative Standard*

The threshold problem posed by respondent's brief is the difficulty of ascertaining what standard respondent is urging this Court to adopt. Respondent's brief offers at least five different accounts of the relationship between its proposed standard and the terms "reckless indifference" in the statute.

First, respondent argues that reckless indifference will suffice only if it is accompanied by a discriminatory act.

> The Act requires that plaintiff to prove that the defendant (1) *acted* ("engaged in a discriminatory practice or discriminatory practices") (2) with . . . reckless indifference to federally protected rights. The two cannot be separated. Otherwise, . . . defendants would be punished unfairly for thoughts isolated from discriminatory actions. (R.Br. 18)(emphasis in original).

This formulation, which abandons "egregiousness" altogether, is consistent with the position of petitioner.

Second, respondent urges that a plaintiff must prove "egregiousness," but insists this is consistent with the statutory language because a demonstration of reckless indifference is sufficient per se to prove egregiousness.

> Actions undertaken with . . . reckless indifference to federally protected rights necessarily involve egregious conduct . . . .(R.Br. 13-14).[1]

This effectively abandons the decision of the court of appeals, reducing it to a semantic quibble which, while accepting proof of reckless indifference as sufficient, insists on labeling such indifference "egregious conduct."

Third, respondent suggests that the controlling legal standard is actually reckless indifference, but that evidence of egregious conduct is one method of proving the existence of reckless indifference.

> The more serious the conduct, the more likely it will cross the threshold from negligence to recklessness. (R.Br. 20).
>
> [T]he lower courts should . . . determine whether . . . the conduct is of a sufficiently egregious character to signify that the employer was recklessly indifferent. . . . (R.Br. 36).[2]

[1] R.Br. 19 ("Malicious and reckless conduct are by definition egregious"), 28 ("malice and recklessness are by definition egregious"), 28-29 ("punitive damages 'require conduct that is "outrageous", either because of the person's "evil motive" or because of his "reckless indifference" to the rights of others.' "), 29 (endorsing EEOC view that Congress "considered any conduct in violation of the statutory 'malice or reckless indifference' standard to be, by definition, egregious"), 31 ("'Punitive damages may be awarded for conduct that is outrageous, because of the defendant's . . . reckless indifference to the rights of others.' ")

[2] R.Br. 39 ("the conduct at issue was certainly not of a sufficiently egregious character to signify that the ADA was recklessly indifferent. . . .")

It is unclear from these passages whether respondent claims that evidence of egregious conduct is the sole method of proving the mental state of reckless indifference.

Fourth, respondent seems to contend that the correct standard is some unexplained concatenation of reckless indifference and egregiousness. E.g.

> [E]gregiousness and reckless are part of an equation, rather than a sum. (R.Br. 29).
>
> [T]he trial court [should make a] . . . determination as to whether there is sufficient evidence of egregious conduct under the standard of malice or reckless indifference . . . . (R.Br. 38).
>
> The award of punitive damages . . . depends on the nature of the discriminatory conduct, not simply the mental state of the defendant. (R.Br. 18)

Fifth, like the court of appeals below, respondent asserts simply that punitive damages cannot be awarded—regardless of the existence of reckless indifference—absent proof of some unusually deplorable conduct.[3] (R.Br. 20, 23). What type of action respondent or the court of appeals would require is unclear. The sort of misconduct which respondent demands is

[3] Respondent's reference to state law cases regarding punitive damages provides no support for this standard. This Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983), was the authoritative analysis of common law punitive damage standards at the time Congress adopted the 1991 Civil Rights Act. That decision is entirely consistent with prevailing state court decisions under which the availability of punitive damages turns on proof of a culpable state of mind. R.L.Blatt, R.W.Hammesfahr & L.S.Nugent, *Punitive Damages: A State by State Guide to Law and Practice* 56-63 (1991)("fourteen states appear to require malice or a similar state of mind . . . to recover punitive damages"; "in twenty-three states . . . willful indifference, wanton, or reckless conduct is sufficient to sustain an award of punitive damages . . ."; "eight states . . . [require] a showing of gross negligence"); 1 L.Schlueter & K.Redden, *Punitive Damages* 514 (3d ed. 1995)("It has long been the rule, at least in most jurisdictions, that punitive damages may be awarded for acts done willfully, wantonly and in reckless indifference to others.")

described variously as "egregious" (R.Br. i, 14, 29-32), "serious" (*id.* 19, 20), "extreme" (id. 23, 28), "reprehensible" (*id.* 23), "outrageous" (*id.* 14, 24), "the worst cases" (*id.* 32) or actions demonstrating a "criminal indifference to civil obligations." (*Id.* 37).[4] Although the court of appeals insisted that this "standard" had been in use in the lower courts in section 1981 cases since at least 1985,[5] respondent is unable to articulate what it means or to explain how an appellate court could ascertain if a district court had misjudged whether a particular action was "egregious" or "outrageous."

Respondent urges this Court to hold that the discrimination proven in this case is not "egregious," but does not offer any principled explanation of how that conclusion should be reached. On the record in the instant case, a jury could find that respondent's officials engaged in a three month concerted scheme of dissembling, obstruction and outright lies in order to prevent the promotion of a woman and to cover up their illegal motives. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 579 (1996)(punitive damages supported by "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive"). The court of appeals, in an indulgent turn of phrase, characterized such actions as "garden variety" discrimination (Pet. App. 18a), rather than egregious or outrageous. How the court of appeals reached that conclusion, and what legal principles might be relied on to distinguish "garden variety" discrimination from "egregious" discrimination, remain entirely obscure.

Although the substance of respondent's proposed standard is opaque, the procedure which it envisages is clearer. Respondent is suggesting that the determination of whether a particular action should be classified as "egregious" would in every instance be a question of law. In the instant case, for example, respondent insists that a single discriminatory

[4] R.Br. 37.

[5] Pet. App. 8a-9a and n.3.

promotion, coupled with dissembling, sexist epithets and objectionable off-color jokes, is not, as a matter of law, egregious; in future cases judges would have to decide which other epithets combined with how many more discriminatory promotions might add up to egregiousness. Given the variety of aggravating and mitigating circumstances that could be present in any given discrimination case, such a legal structure could over time begin to resemble the Sentencing Guidelines.

Respondent does not, however, envision that any such legal guidelines would *limit* the discretion of a district court judge to classify the actions of any particular defendant as non-egregious.

> The lower courts should implement the statutory standard for punitive damages on a case-by-case basis. . . . [T]here should be no *per se* rules defining classes of cases in which it is automatically assumed that punitive damages *will* lie. Each case will depend on the context of the evidence and all the facts and circumstances of the case. (R.Br. 36-38)(emphasis added).

Although there apparently could be per se rules forbidding punitive damages awards in particular classes of cases, no fixed standards would limit the discretion of a district judge to refuse to allow punitive awards. As a practical matter district judges, not juries, would decide whether a defendant's alleged conduct was serious enough to permit a punitive award.

The primacy of district judges would be assured by the one particular aspect of the standard urged by respondent: punitive damages could not be awarded in a case in which, as here, the district judge disagreed with the jury's finding of intentional discrimination.

> In the district court's view, the evidence was not "even suggestive of, let alone demonstrating, a gender related factor in the preference exhibited by everyone for Spangler." . . . *Thus*, the conduct at issue was certainly

not of a sufficiently egregious character . . . . (R.Br. 39)(emphasis added).[6]

Under the Seventh Amendment a federal judge could not, of course, overturn a jury verdict merely because he or she disagreed with it. *Cf. Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). Respondent suggests, however, that such a disagreement between a judge and jury would automatically preclude an award of punitive damages; that proposed rule would also be inconsistent with the Seventh Amendment.

Respondent may intend to assert yet a sixth interpretation of section 1981a, that punitive damages may only be awarded where the evidence of intentional discrimination is particularly conclusive. The court of appeals suggested that "legitimate punitive awards" would not be likely where a plaintiff had prevailed by showing that an employer's proffered explanations were pretextual (Pet. App. 21a n. 9), even though that is the standard method of proof under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. These arguments confuse the type of discrimination required for a punitive award with the type or weight of the evidence which demonstrates the existence of discrimination, and would reward a discriminatory employer that was sufficiently devious to cover up all direct evidence of its illegal motive.

(2) *The Structure of Section 1981a Does Not Require An "Egregious Conduct" Limitation on Punitive Damages*

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[6] *See* R.Br. 43(citing district judge's disagreement with jury verdict.) The court of appeals' panel decision rejected the district judge's view of the evidence, unanimously upholding the jury's liability verdict and expressly admonishing the trial judge that he was bound by the Seventh Amendment to "follow the jury's factual findings" on remand. (Pet. App. 55a-56a). Although the Court of Appeals refused to rehear *en banc* respondent's attack on that liability determination, and although this Court denied respondent's conditional cross petition on this issue (No. 98-364, Nov. 2, 1998), respondent persists in challenging the jury's verdict, repeating the same arguments concerning the evidence that were made to and rejected by the jury.

Respondent raises, and conflates, two distinct contentions—that there should be a two-tiered scheme of *liability* for compensatory and punitive damages,[7] and that there should be a two-tiered scheme for *submission to the jury* of claims for compensatory and punitive damages.[8] The first problem palpably does not exist, and the second problem is not a problem at all. Here, as in most Title VII cases, the distinction is critical.

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), all involved an issue of liability; in those cases the recklessness standard was the liability standard precisely because a showing of recklessness would without more have *mandated* an award of liquidated damages under the ADEA or an additional year of back pay under the FLSA. With regard to compensatory damages under Title VII, the intentional discrimination standard is also the liability rule; where such discrimination is shown, the trier of fact must award compensatory damages in an amount sufficient to redress any proven injury.

But, with regard to punitive damages, proof of intentional discrimination combined with reckless indifference is *not* the liability standard, because such a showing is not sufficient to entitle a plaintiff to an award of punitive damages. The trier of fact remains free to deny punitive damages, despite such a showing, if it is unconvinced that a punitive award is warranted, under the circumstances of the case, to punish or deter intentional discrimination. The trier of fact could also choose to make an award so nominal that all parties would regard the decision as equivalent to the denial of punitive damages. In the instant case, even if petitioner were to prevail in this Court, on remand, a jury convened to hear her claim for punitive damages, although bound by the existing finding of intentional

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[7] R.Br. 14, 15, 22, 23, 26, 29.

[8] R.Br. 13, 22, 28, 30, 33, 36.

discrimination, could still decide to deny any award of punitive damages. Thus, with regard to liability—even under petitioner's literal reading of section 1981a(b)(1)—the standards for compensatory and punitive awards are palpably distinct.

Not content with such a two-tiered liability scheme, respondent insists on two additional tiers. Even though juries already apply distinct standards in determining liability for compensatory and punitive awards, respondent urges that Congress also intended that judges, in determining when claims for compensatory and claims for punitive awards would be submitted to a jury, must utilize standards so different that in practice a large proportion of cases qualifying for possible compensatory awards could not even be considered by the jury on the issue of punitive damages. This would in effect construct a four-tiered system.

Respondent offers no explanation of why the number of cases in which a jury can even consider awarding punitive damages must always be substantially smaller than the number of cases in which compensatory awards are considered. Respondent does not contend that there is some reason to believe that the juries to whom these claims are submitted will fail to follow whatever instructions they are given regarding the liability standard.

(3) *A General Rule Denying Punitive Damages in "Garden Variety" Cases Would Be Inconsistent With The Express Purpose of the 1991 Civil Rights Act*

The central holding of the court of appeals majority was that there are certain types of intentionally discriminatory practices for which punitive damages should never be awarded. The court below apparently envisaged that most discrimination claims would fall within this prohibition, describing the types of discriminatory practices it wished to immunize from punitive damage awards as "garden variety" (Pet. App. 18a) or "standard" (Pet. App. 5a) discrimination. Respondent contemplates that rules could be adopted by the courts

delineating general classes of cases in which punitive damages would be forbidden.

This proposal is flatly inconsistent with the terms of the 1991 Civil Rights Act. Section 2 of the Act explains that the avowed purpose of section 1981a, including the punitive damages provision, was to provide "additional remedies . . . to deter unlawful harassment and intentional discrimination in the workplace." 42 U.S.C. §1981 Notes. This Court noted in *Landgraf v. USI Film Products* that this potential liability for additional monetary relief was enacted to "give managers an added incentive to take preventative measures to ward off discriminatory conduct by subordinates. . . ." 511 U.S. 244, 283 n. 35 (1994).

If this Court were to hold, as respondent urges, that punitive damages are as a matter of law unavailable on the facts of this case, every employer in the nation would be assured that it would be immune from any award of punitive damages if it utilized the particular discriminatory techniques proven here. More broadly, if the courts were to designate specific discriminatory practices or schemes as "garden variety," and thus outside the scope of section 1981a(b)(1), such a safe harbor would eviscerate for those types of intentionally discriminatory actions the very deterrent effect envisaged by Congress. Punitive damages should not be denied for reasons which "if applied generally, would . . . frustrate the central statutory purpose[ ] of eradicating discrimination throughout the economy." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

(4) *One of the Central Purposes of the 1991 Civil Rights Act Was To Give Litigants A Statutory Right to Trial By Jury When Either Compensatory or Punitive Damages Are Sought*

Respondent, like the court below, urges that district judges should play a, if not the, central role in determining whether punitive damages should be awarded against a given defendant,

deciding in most cases to forbid such awards, and permitting jury involvement in the decision only in extreme and atypical situations. The argument for this system is built on wisps of inference assertedly emanating from the interstices of the structure of the statute. The fatal flaw in this proposal can be found in the text: both the actual standard articulated in section 1981a(b)(1) and the terms of section 1981a(c)(1), which provides that where punitive damages are sought "any party may demand a trial by jury." 42 U.S.C. §1981a(c)(1).

Questions regarding the respective roles of juries and judges under the 1991 Civil Rights Act must be addressed in light of the special importance which the Act, and those who supported it, attached to assuring that where damages were sought either party would have a statutory right to a jury trial. Although Congress has provided in many hundreds of statutes for awards of damages, section 1981a(c)(1) is one of the few laws which expressly confers a statutory right to trial by jury.[9] The inclusion in the 1991 Act of that statutory right was of practical importance; absent that provision there would have been no jury trial right in Title VII cases against federal agencies or in Title VII cases tried in state courts. More importantly, supporters and opponents alike understood that the 1991 Act deliberately worked a sea change in the Title VII enforcement process by according to the victims of intentional discrimination the right to have their claims decided by juries.

In the highly partisan legislative history of the 1991 Act, the proposal to provide for jury trials in intentional discrimination cases was one of the most bitterly fought over issues. The inclusion in the legislation of a provision for compensatory and punitive damages was prompted in particular

[9] A computer search of the public laws enacted since 1978 reveals only three other statutes which expressly provided for a jury trial for a specific type of civil action. All of those laws involved employee rights. 2 U.S.C. §1408(c)(Congressional Accountability Act); 28 U.S.C. § 3901(b)(Presidential and Executive Office Accountability Act); 29 U.S.C. §626(c)(2) (Age Discrimination in Employment Act).

by the inefficacy of back pay as a remedy in sexual harassment cases, *Landgraf*, 511 U.S. at 254, and by the perceived inequity in denying to Title VII plaintiffs remedies available under section 1981. From the beginning of the legislative process, the drafts passed by the House and Senate also included a right to a jury trial where such damages were sought. Although employers and congressional opponents quickly agreed that more monetary relief should be provided under Title VII, they fiercely, but ultimately unsuccessfully, resisted jury trials.

The issue which divided Congress for more than a year was framed by a series of alternatives, consistently rejected on the floor of both houses, which would have replaced damages and jury trials with what were labeled "equitable monetary awards" to be made by and at the discretion[10] of the district judge.[11] The critical distinction between these proposals and the language repeatedly adopted by the House and Senate, and ultimately agreed to by the President, was whether judges or juries would award the additional monetary relief which both sides agreed was needed. The proposed substitute measures all contained language overturning the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); the practical effect of those provisions, as members of both houses repeatedly noted, was thus to authorize jury trials and compensatory and punitive damages for a plaintiff seeking relief under section

[10] Supporters of the legislation objected to giving judges discretion to deny relief. 136 Cong. Rec. S16564 (daily ed. Oct. 24, 1990)(remarks of Sen. Kennedy)("The White House bill . . . would give courts vast discretion to deny any meaningful remedy to victims of even the most offensive types of sexual and religious discrimination on the job"); 137 Cong. Rec. H 3860 (daily ed. June 4-5, 1991)(remarks of Rep. Hughes). Under the Michel substitute, egregious conduct was a factor a judge could have considered in determining whether to award additional monetary relief.

[11] 136 Cong. Rec. S9839 (daily ed. July 17, 1990)(Kassebaum substitute); 137 Cong. Rec. H3897 (June 4-5, 1991)(Michel substitute); House Doc 101-251, Civil Rights Act of 1990: Message from the President of the United States Transmitting Alternative Language to S. 210, sec. 8(legislation submitted by President Bush).

1981 for employment discrimination on the basis of race. Thus the core issue which divided Congress in 1990-91 was whether juries should also be available to victims of discrimination on the basis of sex.

The opponents of the 1991 Act objected openly and repeatedly to the proposal to permit juries to decide Title VII intent cases.[12] Their central complaint was that juries were more likely than judges to find intentional discrimination. Critics repeatedly cited a study which, they warned, showed that juries had ruled in favor of employees in a large percentage of state employment cases.[13] Representative Hyde declaimed, "I would like some way to avoid jury verdicts because that is what terrorizes the employer."[14] Representative Stenholm complained that employers should not be subject to the risk of litigation about their employment decisions because they could not be confident that they "can convince a jury that those decisions w[e]re justified," warning that some firms would close rather than run that risk.[15] Senator Hatch said a system of jury trials would be "stacked in . . . favor" of civil rights

[12] 136 Cong. Rec. S16584 (daily ed. Oct. 24, 1990)(remarks of Sen. Helms)(objecting to "unlimited jury trials"), H6773 (daily ed. Aug. 2, 1990)(remarks of Rep. Sensenbrenner)("[b]ecause this is a jury trial system, we turn unlawful employment activities into torts, and the entire tort law system, with all of the warts"), H6775 (remarks of Rep. LaFalce)("my biggest problem . . . is . . . giving plaintiffs an absolute right to demand a jury trial upon an allegation of intentional discrimination"), H6798 (remarks of Rep. Bartlett), H6811 (remarks of Rep. Sensenbrenner), H9991 (remarks of Rep. Stenholm); 137 Cong. Rec. S15468 (daily ed. Oct. 30, 1991)(remarks of Sen. Symms), H3874 (daily ed. June 4-5, 1991)(remarks of Rep. Dornan), H3901 (remarks of Rep. McCollum), H3930 (daily ed. June 5, 1991)(remarks of Rep. Hyde), H3932 (remarks of Rep. Goodling), H9536 (daily ed. Nov. 7, 1991)(remarks of Rep. Sensenbrenner).

[13] 136 Cong. Rec. S9341 (daily ed. July 10, 1990)(remarks of Sen. Thurmond), H6787 (daily ed. Aug. 2, 1990)(remarks of Rep. Ballenger), H6802 (remarks of Rep. Ray).

[14] 136 Cong. Rec. H9403 (daily ed. Oct. 11, 1990).

[15] 136 Cong. Rec. H9991 (daily ed. Oct. 17, 1990).

plaintiffs,[16] and Senator Thurmond endorsed a statement by the Chamber of Commerce claiming that juries would disregard "the legal instructions provided by the judge."[17] Opponents repeatedly argued that if jury trials were permitted that would somehow result in the use of quotas.[18] Representative DeLay denounced the proposal for jury imposed damages as "vicious and vindictive."[19]

Jury trial supporters did not deny that juries might well decide cases differently than judges; manifestly, the long and ultimately successful fight for jury trials was premised on just that conviction. As was true at the time of the adoption of the Seventh Amendment, "[t]hose who favored juries believed that a jury would reach a result that a judge either could not or would not reach." *Parkland Hosiery v. Shore*, 439 U.S. 322, 344 (1979)(Rehnquist, J., dissenting). But supporters insisted that the juries would nonetheless be fair. Opponents argued that juries would be arbitrary and unpredictable[20] and expressed doubts as to their competence to decide liability issues.[21] In response, jury trial supporters asserted that critics of that proposal "seem to have little faith in the intelligence and

[16] 136 Cong. Rec. S16566 (daily ed. Oct. 24, 1990).

[17] 136 Cong. Rec. S9341 (daily ed. July 10, 1990)(statement submitted by the United States Chamber of Commerce).

[18] 136 Cong. Rec. H9402 (daily ed. Oct. 11, 1990)(remarks of Rep. Hyde); 137 Cong. Rec. H3860 (daily ed. June 4, 1991)(remarks of Rep. Vucanovich), H3864 (remarks of Rep. Hyde), H3885 (remarks of Rep. Gunderson), H3885 (remarks of Rep. Gunderson), H3894 (remarks of Rep. Hyde), H3942 (daily ed. June 5, 1991)(remarks of Rep. Gunderson).

[19] 136 Cong. Rec. H6789 (daily ed. Aug. 2, 1990).

[20] 136 Cong. Rec. S9340 (daily ed. July 10, 1990)(remarks of Sen.Thurmond)(jury trials will be a "high-stakes lottery")(letter from United States Chamber of Commerce), S9897 (daily ed. July 18, 1990)(remarks of Sen. Gorton)(plaintiffs will sue in hopes of winning a "jackpot"), H6791 (daily ed. Aug. 2, 1990)(plaintiffs will "gamble for huge awards").

[21] 136 Cong. Rec. H9989 (daily ed. Oct. 17, 1990)(remarks of Rep. Fawell).

common sense of jurors."[22] Representative Collins contended that opposition to the legislation

> shows a fear of the American people. Why do I say this? Because damages are decided by juries. And juries are American. Are we afraid that the same people who entered a voting booth and elected us to our office can't be trusted to enter a jury room and make a decision on punitive damages?[23]

Supporters of the legislation offered detailed rebuttals to a number of the attacks on civil juries. In reply to assertions that juries were likely to make outlandishly large awards,[24] the sponsors proffered studies showing that jury awards in past discrimination cases had generally been modest.[25] Responding to claims that the availability of jury trials would lead to a flood of litigation,[26] they noted that no such problem had existed under section 1981.[27] Significantly, however, no supporter ever rose to dispute assertions that juries might rule in favor of discrimination plaintiffs where judges would not, or to express the hope that that would not occur.

Because of an ongoing controversy about the paucity of women and minorities among federal judicial appointments,

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[22] 136 Cong. Rec. H6800 (daily ed. Aug. 2, 1990)(remarks of Rep. Vento).

[23] 137 Cong. Rec. H3859 (daily ed. June 4, 1991); *see id.* H3949 (daily ed. June 5, 1991)(remarks of Rep. Collins).

[24] E.g. 136 Cong. Rec. S9341 (daily ed. July 10, 1990)(remarks of Sen. Thurmond)(statement of U.S. Chamber of Commerce), S15331 (daily ed. Oct. 16, 1990)(remarks of Sen. Hatch), H6787 (daily ed. Aug. 2, 1990)(remarks of Rep. Ballenger), H6802 (remarks of Rep. Shumway).

[25] 136 Cong. Rec. S9908 (daily ed. July 18, 1990)(remarks of Sen. Kennedy), H6812 (daily ed. Aug. 2, 1990)(remarks of Rep. Edwards), H9982 (daily ed. Oct. 17, 1990)(remarks of Rep. Henry).

[26] E.g. 136 Cong. Rec. S16580 (daily ed. Oct. 24, 1990)(remarks of Sen Burns), H6786 (daily ed. Aug. 2, 1990)(remarks of Rep Moorhead).

[27] 136 Cong. Rec. H6790 (daily ed. Aug. 2, 1990)(remarks of Rep. Slattery), H6800 (remarks of Rep. Vento).

jury trial proponents were well aware, for example, that if judges were responsible for deciding whether there should be punitive awards for sex discrimination, the vast majority of those decisions would be made by men and men alone.[28] On the other hand, federal law as well as the Constitution, assured that a civil jury would include men and women with a wide range of experiences and perspectives. *See* 28 U.S.C. §§ 1861, 1863. Congress could sensibly conclude that a jury, composed of individuals with such diverse backgrounds, would bring to the determination of intentional discrimination cases an invaluable understanding of the realities of the workplace, the nuances of race and gender relations, and the complexities of human motivation. In the instant case, the district judge's frank disagreement with the jury's finding of intentional discrimination illustrates the practical impact of Congress' decision to authorize jury trials.

The legislative history of section 1981a(b)(1) is wholly consistent with a literal reading of the statute. *See* Pet. Br. at 36-45. During the floor debates, most of the references to the substance of what became section 1981a(b)(1) either recited the actual terms of that provision or simply lumped compensatory and punitive damages together, describing both as available

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[28] In 1988, a year before it began work on what would become the 1991 Civil Rights Act, the Senate Judiciary Committee held a hearing devoted specifically to the small number of women and minorities who had been appointed to the federal bench since 1980. Hearings Before The Senate Judiciary Committee on the Performance of the Reagan Administration in Nominating Women and Minorities to the Federal Bench, 100th Cong., 2d Sess. (1988). The hearing was prompted in particular by the fact that in the 1980's, at a time when the number of women attorneys was growing dramatically, the proportion of women on the federal judiciary was actually declining; in 1987-88, 94.6% of all judicial nominees were men. *Id.* at 2. From 1981 to 1988 all of the 14 new judges in the District of Columbia circuit were white men. *Id.* 42. One witness argued pointedly, "It is unseemly that all, or nearly all sex and race discrimination claims in a given court should be heard by white male judges." *Id.* at 144 (testimony of Estelle Rogers).

where intentional discrimination was proven.[29] Opponents objected either that punitive damages might indeed be available in every case of intentional discrimination[30] or that the statutory standard was too vague.[31] The scant references to the role of judges under the proposed legislation referred only to the limited authority of a judge to act *after* a jury verdict.[32]

At the end of this protracted struggle Congress adopted virtually unchanged the original proposal for jury imposed damages, subject to a cap. Senator Jeffords explained that at the beginning of the legislative process

[29] E.g. 136 Cong. Rec. H6779 (daily ed. Aug. 2, 1990)(remarks of Rep. Schroeder)("[y]ou do not get punitive damages unless there was intent"), H6793 (remarks of Rep. Hoyer)("these damages are available only in cases of intentional discrimination"), H6800 (remarks of Rep. Kleczka)(the legislation "would add compensatory and punitive damages under title VII for victims of intentional job bias"), H9993 (daily ed. Oct. 17, 1990)(remarks of Rep. Scheuer)(legislation "allows compensatory and punitive damages for proven intentional discrimination"); 137 Cong. Rec. H3874 (daily ed. June 4, 1991)(remarks of Rep. Moody)("[f]or punitive damages, discrimination must be shown to be intentional"), H3888 (remarks of Rep. Owens)(legislation permits "victims of intentional discrimination . . . to collect monetary compensatory and punitive damages").

We do not suggest that these remarks can displace the additional statutory requirement of proof of reckless disregard or malice, but they illustrate the fallacy of the court of appeals' supposition that Congress must have believed the standards for compensatory and punitive damages were dramatically different.

[30] 136 Cong. Rec. S9341 (daily ed. July 10, 1990)(remarks of Sen Thurmond)(statement of United States Chamber of Commerce)("because the Act adopts a 'reckless disregard of the rights of others' standard, and because intentional discrimination necessarily involves a disregard of others' rights, punitive damages would seem to be available in virtually every case involving intentional discrimination.")

[31] *Id.*; 136 Cong. Rec. H6779 (daily ed. Aug. 2, 1990)(remarks of Rep. Fawell).

[32] 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991)(remarks of Rep. Edwards); S15484 (daily ed. Oct. 30, 1991)(remarks of Sen. Dole).

> [T]he creation of tort-like damages under title VII was viewed as a longshot at best . . . [but now] such damages are a central part of every civil rights proposal. . . . In one form or another, this is an idea whose time has come. In fact, the only remaining questions appear to be whether such damages will be unlimited as to amount or capped and, to a lesser extent, whether they will be awarded by judges or juries. . . . [W]hile the compromise calls for damages awarded by juries, getting the administration to give in on this point was a major achievement leading to this agreement.

137 Cong. Rec. S15383 (daily ed. Oct. 29, 1991).

The terms and legislative history of section 1981a(b)(1) are complemented by Congress's overarching decision, reached after a protracted struggle and embodied in the text of the statute, that where compensatory or punitive damages were sought, either party was entitled to have a jury decide the measure and availability of those damages. The 1991 Act should not be interpreted in a way which denigrates the central enforcement role which Congress intended to accord to civil juries, or on the basis of objections to those juries which Congress considered and rejected.

II. THERE IS NO INDEPENDENT ALTERNATIVE BASIS FOR DISMISSING PETITIONER'S CLAIM FOR PUNITIVE DAMAGES UNDER THE MALICE PROVISION OF SECTION 1981A(B)(1)

Respondent does not squarely dispute the correctness of the legal standard set out in our opening brief; rather, respondent urges as an alternative ground for affirmance that the circumstances of this case do not satisfy that standard.

Respondent first advances a factual argument. We stressed in our brief that Wheat had repeatedly used the terms "bitch" and "battleaxe" to refer to professionally prominent women, and had persisted in telling lewd jokes at office meetings even

after plaintiff objected. Respondent contends that these actions "certainly do not signify" any form of hostility toward women. (R.Br 42). The assessment of the significance of these actions, however, is the quintessential function of the trier of fact. Although not required to do so, a reasonable jury could assuredly conclude that such remarks revealed an animus or demeaning attitude towards women. While, for example, the term "bitch" has a variety of meanings, one of them is an expression of animus toward women who are ambitious or who use their authority in a manner contrary to the wishes of the man speaking;[33] that particular usage of "bitch" fits the circumstances in which the disputed remarks occurred in this case. The lower courts have repeatedly recognized that use of the term "bitch" can be sufficiently gendered and offensive to constitute a significant element of a sexual harassment claim.[34]

Second, respondent urges that statements by participants in a decisionmaking process expressing animus towards women are legally irrelevant unless those statements are "related to the employment decision in question." (R.Br. 42). But whether such remarks are "related to" an allegedly discriminatory act is precisely the issue which the trier of fact must decide. Although biased statements often would not be conclusive,

[33] The evolution in the meaning of this epithet is traced in Beverly Gross, "Bitch", *Salmagundi: A Quarterly of the Humanities & Social Sciences*, no. 103, p. 146 (1994). "The metamorphosis of bitch from the context of sexuality (a carnal woman, a promiscuous woman) to temperament (an angry woman, a malicious woman) to power (a domineering woman, a competitive woman) is a touchstone to the changing position of women through this century." *Id.* at 141. *See id.* at 146 ("the male equivalent of the word bitch [is] 'Boss'"), 148 (the various usages of "bitch" include "a woman who is annoying, pushy, possibly underhanded (in short, a man in a woman's body)").

[34] *Excel Corp. v. Bosley*, 1999 WL 16392 *1 (8th Cir. 1999); *Barna v. City of Cleveland*, 1998 WL 939884 *2 (6th Cir. 1998); *Howard v. Burns Bros., Inc.*, 149 F. 3d 835, 838-39 & n. 2 (8th Cir. 1998); *Mockler v. Multnomah County*, 140 F. 3d 808, 811 (9th Cir. 1998); *Morrison v. Carleton Woolen Mills, Inc.*, 108 F. 3d 429, 434 (1st Cir. 1997).

such "remarks can certainly be *evidence* that gender" played a role in a disputed employment decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)(emphasis in original). Hostile or demeaning statements about or directed at women or minorities are significant because they may well reveal the existence of fixed and persistent prejudices likely to animate decisions at another point in time. The fact that a supervisor announced in March that he had a cold would not explain why he closed a window in December; but the fact that the supervisor in 1997 referred to an African-American worker as a "nigger" would obviously be relevant to determining his motives in dismissing that worker in 1998.[35]

Third, although conceding that Wheat had "significant input into the promotion decision" (R.Br.40), respondent insists that any misogyny on Wheat's part is irrelevant because Allen "did not simply act as a conduit" for Wheat's prejudices. (R. Br. 41). But evidence of a subordinate's bias remains relevant "where the ultimate decision maker is not insulated from the subordinate's influence." *Griffin v. Washington Convention Ctr.*, 142 F. 3d 1308, 1312 (D.C.Cir. 1998).[36] Even if Allen did not act at Wheat's direction and control, Wheat's attitudes

[35] The appropriate method of analyzing such evidence was correctly summarized in the jury instruction on this issue quoted in *McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals*, 140 F. 3d 288, 301 n.8 (1st Cir. 1988), *cert. denied*, 119 S. Ct. 870 (1999).

[36] The lower courts have recognized the wide variety of ways in which the biased actions of one official can shape the employment decisions of another. *Long v. Eastfield College*, 88 F. 3d 300, 307 (5th Cir. 1996)(first official recommended dismissal of plaintiff); *Stacks v. Southwestern Bell Yellow Pages*, 27 F. 3d 1316, 1323 (8th Cir. 1994)(first official controlled information provided to the second); *Simpson v. Diversitech Gen'l, Inc.*, 945 F. 2d 156, 160 (6th Cir.1991)(first official filed adverse personnel report), *cert. dismissed*, 502 U.S. 1083 (1992); *Shager v. Upjohn Co.*, 913 F. 2d 398 (7th Cir. 1990)(first official assigned plaintiff more difficult tasks and issued adverse job performance evaluations); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F. 2d 1554, 1565 (11th Cir. 1987)(first official discussed proposed discharge with second official).

and actions could easily have tainted and shaped the outcome of the decisionmaking process.[37]

Cases such as this involving the interaction of several decisionmakers are controlled by this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Once a plaintiff establishes that malice played a significant role in a disputed employment decision, the defendant bears the burden of proof of establishing that it would have made the same decision even in the absence of that prejudice. 490 U.S. at 239-47. Although it is possible that on remand respondent will be able to persuade the trier of fact, as it urges here, that "Allen's role as the decisionmaker diminishes the significance" (R.Br. 42) of any malice on Wheat's part, no basis exists for imposing such a conclusion as a matter of law.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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[37] Because Wheat failed for several weeks to pass on petitioner's interest in the promotion, Allen may largely have made up his mind in favor of Spangler by the time petitioner applied. Wheat's action in allegedly misrepresenting the quality of petitioner's writing, while sanctioning for Spangler alone the special briefings from O'Donnell, would assuredly have skewed Allen's view of the comparative merits of the candidates. Wheat's recommendation of Spangler may have confirmed the result of a process that was unfairly tilted against petitioner from the start. Actions taken by Wheat played a determinative role in the decisionmaking process.

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No. 98-208

In the Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD, PETITIONER

v.

AMERICAN DENTAL ASSOCIATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, authorizes the award of punitive damages to a person who has been subjected to employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, if the defendant is not a governmental entity, the discrimination was intentional, and it was engaged in "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1). The question presented is:

Whether a showing of "egregious" discriminatory conduct is necessary for an award of punitive damages under 42 U.S.C. 1981a(b)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-208

CAROLE KOLSTAD, PETITIONER

v.

AMERICAN DENTAL ASSOCIATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the standard for submitting a claim of punitive damages to a jury under 42 U.S.C. 1981a(b)(1), which authorizes the award of punitive damages against private employers in certain cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title I of the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.* See 42 U.S.C. 1981a(a) and (b)(1). The Equal Employment Opportunity Commission (EEOC) has authority to enforce both statutes against private employers and to seek punitive damages. 42 U.S.C. 1981a(b)(1) and (d)(1), 2000e-5(a) and (f), 12117(a). The EEOC participated as *amicus curiae* in this case in the court of appeals. In addition, the Fair Housing Act has been interpreted as

incorporating a standard for punitive damages that is similar to the Section 1981a standard at issue in this case. The Attorney General is responsible for enforcing the Fair Housing Act, see 42 U.S.C. 3612(o)(3), 3613(c)(1), 3614(d)(1)(B). The Court's decision in this case thus is likely to affect the enforcement responsibilities of the EEOC and the Attorney General.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), prohibits employers from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2(a), 2000e(b) and (f). As originally enacted, Title VII afforded prevailing plaintiffs only equitable remedies, such as back pay and reinstatement. 42 U.S.C. 2000e-5(g)(1); see also *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 252-253 (1994). Compensatory and punitive damages were available under 42 U.S.C. 1981 to some victims of racial discrimination in employment, see *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975), but not to victims of discrimination based on sex or religion.

Section 102 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991 Act), significantly expanded the remedies available under Title VII to victims of unlawful discrimination that is intentional, rather than unlawful because of disparate impact. The 1991 Act created a new Section 1981a, which provides that victims of unlawful intentional discrimination under Title VII, as well as some victims of discrimination prohibited by Title I of the Americans With Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (Disabilities Act), can recover compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. 1981a(b)(3). Section 1981a further authorizes the award of punitive damages

under Title VII and the Disabilities Act in certain circumstances:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. 1981a(b)(1).[1] Section 1981a limits the total amount of compensatory and punitive damages for which an employer can be held liable by imposing caps, which depend upon an employer's size, ranging from $50,000 to $300,000. 42 U.S.C. 1981a(b)(3).

2. Petitioner Carole Kolstad sued her employer, respondent American Dental Association, for sex discrimination under Title VII. In the fall of 1992, petitioner, who was respondent's Director of Federal Agency Relations, applied for the newly vacant position of Director of Legislation and Legislative Policy and Director of the Council on Government Affairs and Federal Dental Services. Pet. App. 3a. Petitioner was denied the promotion, which instead went to Tom Spangler, respondent's Legislative Counsel. *Id.* at 44a.

Petitioner filed suit under Title VII, alleging that respondent denied her promotion to the higher-ranking position because of her sex. Pet. App. 4a. The case was tried before a jury. *Id.* at 45a. At the close of evidence, the

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[1] Section 1981a precludes an award of compensatory or punitive damages under the reasonable accommodation provision of the Disabilities Act, 42 U.S.C. 12112(b)(5), where the employer "demonstrates good faith efforts, in consultation with the person with the disability * * *, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business." 42 U.S.C. 1981a(a)(3).

district court dismissed petitioner's claims for compensatory and punitive damages. *Ibid.* The jury returned a verdict in favor of petitioner, finding that respondent had unlawfully discriminated against petitioner on the basis of sex, and awarding $52,718 in back pay. *Ibid.*; J.A. 109-110.

3. Both petitioner and respondent appealed. The court of appeals unanimously rejected respondent's challenge to the liability determination, and reversed and remanded for reconsideration the denial of injunctive relief and attorneys' fees. Pet. App. 46a-49a, 54a-56a, 68a. A divided panel reversed the refusal to submit the punitive damages claim to the jury. *Id.* at 49a-54a, 57a-68a.

The court of appeals granted rehearing *en banc* limited to the punitive damages question. In a six-to-five decision, the court of appeals affirmed the district court. Pet. App. 1a-41a. The court ruled that Section 1981a permits a jury to consider punitive damages only in cases of "particularly egregious violations of Title VII," *id.* at 6a, and it found no such egregiousness in this case, *id.* at 12a. The court acknowledged that the additional requirement it was imposing for the award of punitive damages was not set forth in the statute itself. *Id.* at 5a, 6a. The court concluded nevertheless that a literal reading of Section 1981a "would conflict with the remedial structure of the statute [and] with legislative history." *Id.* at 6a. Judge Randolph concurred separately, stressing that the issue of statutory interpretation raised by the case was "exceedingly close." *Id.* at 23a.

Judge Tatel, joined by four other judges, dissented. The dissent noted that Section 1981a "never mentions egregiousness." Pet. App. 24a. Rather, Section 1981a's "reckless indifference" standard "makes the difference between compensatory and punitive damages depend on the employer's awareness of Title VII's legal mandates." *Id.* at 26a (internal quotation marks omitted). The dissent noted that "employers found to have intentionally discriminated in violation

of Title VII" may still be able "to convince a judge to remove the question of punitive damages from jury consideration altogether," if, for example, they relied upon the bona fide occupational qualification defense erroneously but not recklessly, or overreached in a good-faith effort to remedy the effects of past discrimination. *Id.* at 29a. Furthermore, application of the statutory standard does not mean that "juries will automatically award punitive damages in every Title VII disparate treatment case," because a jury, in the exercise of its "discretionary moral judgment," may decide not to award punitive damages even upon proof of an intentional violation of the statute. *Id.* at 28a.

SUMMARY OF ARGUMENT

A. The plain language of Section 1981a authorizes punitive damages when, in addition to engaging in intentional discrimination under Title VII or the Disabilities Act, the defendant did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1). Congress thus established a standard for punitive damages that adds to the underlying liability standard a requirement that focuses on the employer's disregard of governing legal obligations. The plaintiff must show that the defendant either acted maliciously—that is, with an evil motive or the purpose of injuring—or disregarded a substantial risk that its conduct would violate the plaintiff's legal rights.

Nothing in the text of Section 1981a requires the plaintiff, in addition, to show that the underlying discriminatory conduct was egregious. The egregiousness of an employer's conduct may constitute evidence of an employer's malice or reckless indifference to an employee's rights. But other sources of evidence may be equally probative of malice or reckless indifference; the court of appeals erred in making egregious conduct the sole path to a punitive damages award.

B. The legislative history of Section 1981a provides no basis for supplementing the punitive damages standard Congress enacted with an extra-statutory limitation. Instead, the legislative history shows that Congress made purposeful choices in structuring the punitive damages provision, reflecting a substantial compromise between the economic interests of employers and the interests of employees and the public generally in eliminating discrimination from the workplace. That history shows that Congress intended to protect employers, not through narrowing the standard for punitive damages liability, but rather by capping the damages ultimately available to the employee. Adopting an interpretation of Section 1981a that both curtails the availability of punitive damages and limits that liability with damage caps would upset Congress's delicate and hard-fought compromise.

C. Adherence to Section 1981a's language is consistent with the purposes underlying the 1991 Act. First, a primary objective of the legislation was to deter discriminatory practices from occurring in the first place. The availability of punitive damages in cases of unlawful intentional discrimination advances that goal. Congressional frustration with the perpetuation of unlawful intentional discrimination nearly thirty years after the passage of Title VII reinforced the judgment that employers should face the threat of punitive damages whenever they act with malice or with reckless indifference to Title VII's prohibitions. In other words, through Section 1981a(b)(1), Congress determined that all unlawful intentional discrimination undertaken with malice or reckless indifference to federal law is inherently deserving of punishment through an award of punitive damages. The court of appeals was not free to reconsider that judgment.

Second, Title VII advances both private and public interests in a workplace free of discrimination. Title VII plaintiffs serve, in part, as private attorneys general vindi-

cating the federal interest in abolishing employment discrimination on the basis of race, gender, religion, and national origin. The standard Congress established for punitive damages in Section 1981a thus reflects that intentional discrimination, when undertaken with malice or reckless indifference to established prohibitions, causes both individualized and public injury and thus merits a commensurately broad remedial response.

ARGUMENT

SECTION 1981a(b)(1) AUTHORIZES PUNITIVE DAMAGES IN CASES OF UNLAWFUL INTENTIONAL DISCRIMINATION WHENEVER A PLAINTIFF DEMONSTRATES THAT THE DEFENDANT ACTED WITH MALICE OR RECKLESS INDIFFERENCE TO THE PLAINTIFF'S FEDERALLY PROTECTED RIGHTS

A. The Text Of Section 1981a Makes The Availability Of Punitive Damages Turn Upon The Employer's Malice Or Reckless Indifference To Federal Rights

1. The task of discerning the governing standard for an award of punitive damages under Section 1981a "begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this case, that is also where the inquiry ends, for Congress has spoken directly to the matter in the text of Section 1981a. Congress provided that, in cases of intentional discrimination prohibited by Title VII and the Disabilities Act, or a failure reasonably to accommodate under the Disabilities Act, a complaining party may recover punitive damages from a nongovernmental employer whenever she demonstrates that the employer engaged in the discrimination "with malice or with reckless indifference to [her] federally protected rights." 42 U.S.C. 1981a(b)(1).[2]

[2] Title VII and the Disabilities Act apply not just to employers, but also to other entities involved in the employment process such as employ-

The text of Section 1981a thus makes the availability of punitive damages turn upon the employer's malice or recklessness concerning its legal obligations at the time it engaged in the discriminatory conduct. If the employer undertakes its discriminatory acts maliciously (that is, with an evil motive or with the purpose of injuring the plaintiff),[3] or acts in disregard of a substantial risk that its conduct is unlawful,[4] then punitive damages are available.

The punitive damages standard Congress enacted adds an important element to the underlying liability standards for Title VII and the Disabilities Act. Liability for equitable relief under those statutes does not require intent. Liability for compensatory damages generally requires intent to discriminate (an employment practice with a disparate impact will not suffice, 42 U.S.C. 1981a(a)); the employer's malice or recklessness regarding its legal obligations, however, is neither a prerequisite to nor a necessary component of the

ment agencies and labor unions. See 42 U.S.C. 2000e-2(a)-(c), 12111(2), 12112(a). Throughout this brief, "employer" refers collectively to all covered entities under both statutes.

[3] See, *e.g.*, *Smith* v. *Wade*, 461 U.S. 30, 48, 56 (1983) (malice entails "an actual intent to injure" or "evil motive"); *id.* at 39 n.8 (noting varying meanings of malice, which include both subjective and objective significations); *Tinker* v. *Colwell*, 193 U.S. 473, 486 (1904) (malice "means a depraved inclination on the part of a person to disregard the rights of others").

[4] See *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 617 (1993) (employer acts with reckless disregard if it "more likely knows its conduct to be illegal"); see generally *Farmer* v. *Brennan*, 511 U.S. 825, 836-837 (1994) ("The civil law generally calls a person reckless who acts or * * * fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known.") (citations omitted). The phrases "reckless indifference" and "reckless disregard" are commonly used interchangeably, and nothing indicates that Congress intended otherwise here. See, *e.g.*, *Black's Law Dictionary* 1270 (6th ed. 1990); *Farmer*, 511 U.S. at 836; *Smith*, 461 U.S. at 37, 38 n.6, 48, 51, 56; Restatement (Second) of Torts § 500 cmt. a (1965).

plaintiff's burden of proof. See generally *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Only for punitive damages does the employer's malice or disregard of its legal obligations become relevant. Accordingly, as both the majority and the dissent below recognized (Pet. App. 5a-6a, 25a-26a), a finding of intentional discrimination, without more, does not automatically make a plaintiff eligible to receive punitive damages. She must separately prove that the discriminatory conduct was undertaken by the employer either with malice or with reckless indifference to its legal obligation to avoid discrimination.[5]

2. The egregiousness standard adopted by the court of appeals (Pet. App. 12a) "has no statutory reference point." *Shannon* v. *United States*, 512 U.S. 573, 584 (1994). The word "egregious" is nowhere present in Section 1981a. Indeed, the focus of the court of appeals on the outrageous nature of the underlying discriminatory conduct is wholly inconsistent with the focus of Section 1981a(b)(1) on the employer's malice or recklessness regarding its legal obligations.

Moreover, when Congress has chosen to condition liability on egregious behavior, it has done so expressly, both in civil rights legislation and elsewhere.[6] When a statutory term is

[5] See *Emmel* v. *Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996) (explaining difference between the liability and punitive damages standards); EEOC Compliance Manual, *Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991* 52 (1992) (*Enforcement Guidance*) ("A finding of liability does not of itself entitle a plaintiff to an award of punitive damages."). While the plaintiff's burden of proof for punitive damages is thus distinct from its burden at the liability stage, the plaintiff will not always have to introduce additional evidence to obtain punitive damages. In many cases, the evidence that establishes liability will also establish malice or reckless indifference.

[6] See 42 U.S.C. 1997a(a) (authority of Attorney General to bring suit when a State or state officials subject institutionalized persons "to

absent in one statute, but explicit in others, "Congress' silence * * * speaks volumes." *United States* v. *Shabani*, 513 U.S. 10, 14 (1994).

3. The court of appeals thought the reckless indifference standard Congress enacted was too vague to determine the difference between liability and punitive damages, Pet. App. 6a, but the court was mistaken. First, the standard Congress enacted and its functional equivalents have been considered sufficiently concrete to govern punitive damages under 42 U.S.C. 1983, *Smith* v. *Wade*, 461 U.S. 30, 56 (1983), punitive damages under the First Amendment, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), and, in the criminal context, the imposition by a jury of a death sentence, *Tison* v. *Arizona*, 481 U.S. 137, 158 (1987). Given that pedigree, the standard is surely also sufficiently lucid to permit jury imposition of a moderately capped punitive damages award. See *Smith*, 461 U.S. at 49 ("[W]e are not persuaded that a recklessness standard is too vague to be fair or useful.").

Second, the court of appeals' egregiousness standard is no clearer. Compare *County of Sacramento* v. *Lewis*, 118 S. Ct. 1708, 1717 n.8, 1718-1720 (1998) (equating "egregious" behavior with conduct that, rather than merely being recklessly indifferent, shocks the conscience), with *Tincher* v. *Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1132-1134 (7th Cir. 1997) (equating "egregious[]" behavior with malice or reckless indifference). Indeed, the court of appeals failed even to define the term. Pet. App. 12a-13a.

Third, and in any event, the imprecision in the statutory language that the court of appeals perceived provides no warrant for judicially amending the statute. See *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 479 (1995) (emphasizing the Court's "obligation to avoid judicial legislation").

4. The absence of an egregiousness standard in the text of Section 1981a does not mean that the shocking or appalling character of a defendant's discriminatory conduct must be deemed irrelevant to the punitive damages inquiry. The egregiousness of the discriminatory conduct provides evidence of a defendant's malice or reckless indifference to the plaintiff's federally protected rights.[7] The more blatant and outrageous the discrimination, the stronger the inference that the employer knew or should have been aware of the substantial risk that its behavior had crossed the line of legality.

But demonstrating egregiousness is only one of many available means of proving that the standard set by Congress for punitive damages liability has been satisfied. Other evidence may be equally probative. First, reckless indifference is more likely where the discrimination is blatant and the legal prohibition clear. Second, the employer's recklessness may be evidenced by expressions of hostility to or resentment of federal civil rights law. Third, efforts to conceal or doctor evidence regarding the employment decision, the use of sham selection procedures, and the

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egregious or flagrant conditions" that deprive those individuals of their rights under federal law); see also 42 U.S.C. 1396u-2(e)(2)(B)(i) (providing for State supervision of Medicaid managed care organization that engages in "continued egregious behavior"); 12 U.S.C. 1708(c)(3)(D) (authorizing withdrawal of mortgagee where violations of law have been "egregious or willful"); 19 U.S.C. 2242(b)(1)(A) (identification of countries by the United States Trade Representative that "have the most onerous or egregious acts, policies, or practices" that deny effective intellectual property rights protection).

[7] See *Enforcement Guidance*, *supra*, at 53 (egregiousness can be one of many relevant factors demonstrating malice or reckless indifference). As an administrative interpretation by the enforcing agency, the EEOC's construction of Section 1981a's punitive damages provision merits some deference. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975); see also *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 256-258 (1991).

tailoring of job criteria can suggest an evasion of known legal requirements. Fourth, a pervasive or lengthy pattern of discriminatory behavior, retaliation against a complainant, or other inappropriate responses to complaints of discrimination may tend to show the employer's recklessness. Lastly, the sophistication of the employer and its prior experience with discrimination complaints may also be relevant.[8] The flaw in the court of appeals' reasoning was not that it permitted egregiousness to play a role in identifying what cases are eligible for punitive damages, but that the court made egregiousness the defining criterion for punitive damages, rather than simply one form of relevant evidence that may be used to satisfy Congress's standard.

B. The Structure Of Section 1981a Supports A Standard Of Liability For Punitive Damages That Focuses On The Employer's Malice Or Reckless Indifference To The Unlawfulness Of Its Conduct

1. The structure of Section 1981a also supports conditioning punitive damages liability on the employer's malice or reckless indifference to the wrongfulness of its conduct, rather than its egregiousness. See generally *Conroy* v. *Aniskoff*, 507 U.S. 511, 515 (1993) ("[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.") (internal quotation marks and citation omitted).

[8] See, *e.g.*, *Enforcement Guidance*, *supra*, at 53-54 (non-exclusive list of relevant factors); *EEOC* v. *Wal-Mart Stores, Inc.*, 156 F.3d 989, 992-993 (9th Cir. 1998); *Harris* v. *L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997); *Williamson* v. *Handy Button Mach. Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987); *Walters* v. *City of Atlanta*, 803 F.2d 1135, 1148 (11th Cir. 1986); *Stallworth* v. *Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985); *cf. TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 462-463 & n.28 (1993) (opinion of Stevens, J.) (factors relevant to punitive damages generally); *id.* at 468-469 (opinion of Kennedy, J.) (same).

Section 1981a separately provides for compensatory damages and punitive damages. The compensatory damages provision requires proof of intentional discrimination (or, in the case of some disability decisions, a failure to act reasonably and in good faith to accommodate a disability) and actual injury, 42 U.S.C. 1981a(a) and (b)(3). The punitive damages provision turns upon the employer's malice or reckless indifference to its legal obligations. As reflected in the structure of Section 1981a, Congress thus envisioned that the two forms of damages would entail different inquiries.

The court of appeals correctly perceived the intent to create a two-tiered structure, but mistakenly concluded that punitive damages should require a heightened version of the same facts necessary for compensatory damages—discriminatory intent and injury—instead of recognizing that an award of punitive damages requires something else altogether. The court of appeals thus reduced Congress's separately structured compensatory and punitive damage inquiries into two points along a single continuum.

2. The court of appeals found it appropriate to add a requirement of a "particularly egregious violation[]" (Pet. App. 6a) to the punitive damages statute in order to ensure a meaningful two-tiered liability scheme, in which not every finding of intentional discrimination automatically qualifies for punitive damages. *Id.* at 6a, 18a. But this Court has already rejected precisely that reasoning in construing an analogous provision of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 626(b). That provision authorizes an award of liquidated (double) damages for "willful" violations of the ADEA. In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 126 (1985), this Court held that liquidated damages under the ADEA are, like the punitive damages at issue here, intended "to be punitive in nature." *Id.* at 125. The Court further held that a violation of the ADEA is willful, warranting punitive damages, "if the

employer * * * knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Id.* at 126 (internal quotation marks omitted).

In *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604 (1993), the Court rejected the invitation to find in the ADEA, in addition to the requirement of reckless disregard of the law, a further requirement of "outrageous" conduct. *Id.* at 615.[9] In that case, as here, the employer argued that the additional element was necessary to maintain a two-tiered system and ensure that not every violation of the ADEA qualified for liquidated damages. *Id.* at 614-616.

This Court unanimously rejected the suggestion that courts should impose extra-statutory conditions on punitive awards, for two reasons. First, the suggestion is inconsistent with the plain language of the statute:

> The ADEA does not provide for liquidated damages "where consistent with the principle of a two-tiered liability scheme." It provides for liquidated damages where the violation was "willful." That definition must be applied here * * *.

Hazen Paper, 507 U.S. at 616.

Second, the suggestion is unnecessary, because the statute establishes an adequately differentiated two-tiered system without judicial amendment. The Court noted that the ADEA "is not an unqualified prohibition on the use of age in employment decisions," *Hazen Paper*, 507 U.S. at 616, but rather affords a "bona fide occupational qualification defense" and exempts certain subject matters and persons, thus leaving ample opportunity for an employer to believe in

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[9] The requirement of "outrageous" conduct had been adopted by *Lockhart* v. *Westinghouse Credit Corp.*, 879 F.2d 43, 57-58 (3d Cir. 1989); other circuits had adopted different requirements. See, *e.g.*, *Neufeld* v. *Searle Labs.*, 884 F.2d 335, 340 (8th Cir. 1989) (evidence must be direct rather than circumstantial); *Spulak* v. *K Mart Corp.*, 894 F.2d 1150, 1159 (10th Cir. 1990) (age must be the "predominant" factor).

good faith and without recklessness that the statute permits a particular age-based decision. *Ibid.* Quite simply, "[i]t is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA." *Ibid.* The difference between liability for compensatory relief under the statute and liability for liquidated double damages is a showing of "willfulness." Accordingly, "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous" to merit punitive liquidated damages under the ADEA. *Id.* at 617.

That same reasoning controls here. Congress did not authorize punitive damages under Section 1981a only "where consistent with the principle of a two-tiered liability scheme." *Hazen Paper*, 507 U.S. at 616. It authorized punitive damages whenever the employer engages in unlawful intentional discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1).

Moreover, it simply is not true that, absent additional extra-statutory limitations, punitive damages will be available in all cases of unlawful intentional discrimination under Title VII or the Disabilities Act. They are available only where the employer engages in unlawful intentional discrimination (or an unlawful failure to accommodate) with malice or reckless indifference to the law. An employer may be liable for compensatory damages, but not punitive damages under Title VII when the employer relies on a prohibited characteristic believing mistakenly but in good faith that the trait is a bona fide occupational qualification, 42 U.S.C. 2000e-2(e); or that he is making a valid effort to remedy the effects of past discrimination; or that he is not obliged to accommodate a particular religious exercise because of "undue hardship," 42 U.S.C. 2000e(j); or that an individual falls within the "personal staff" exception to Title VII, 42 U.S.C. 2000e(f).

Similarly, under the Disabilities Act, an employer may be liable for equitable relief and compensatory damages, but not punitive damages, where he mistakenly but in good faith believes that (i) the employee is not a "qualified individual" for the position, 42 U.S.C. 12111(8); (ii) differential treatment of the individual with a disability is a "business necessity," 42 U.S.C. 12113(a); (iii) the employee would pose a "direct threat" to the health or safety of others, 42 U.S.C. 12113(b); (iv) the employee can be segregated from certain functions because he carries an infectious or communicable disease, 42 U.S.C. 12113(d); or (v) the employee has not been rehabilitated from his illegal use of drugs, 42 U.S.C. 12114, 12210.[10]

Under both Title VII and the Disabilities Act, liability judgments based on novel legal theories may also be ineligible for punitive damages if the employer would not have been on clear notice of the legal infirmity of its conduct. Further, the responsibility of an employer for punitive damages for co-worker harassment or non-tangible employment actions accomplished through attenuated agency relationships has not yet been settled.[11] Finally, punitive damages "are never awarded as of right"; an award always rests within the jury's "discretionary moral judgment." *Smith*, 461 U.S. at 52.

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[10] Section 1981a separately immunizes from compensatory and punitive damages good faith efforts by an employer, cooperating with the employee, to accommodate a disability. 42 U.S.C. 1981a(a)(3).

[11] Compare Pet. App. 30a ("Attribution of employee state of mind differs when the jury turns to the question of punitive damages."), and *Splunge* v. *Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996) (state of mind of harassing employee not imputed to the company for purposes of punitive damages), with *Deffenbaugh-Williams* v. *Wal-Mart Stores, Inc.*, 156 F.3d 581, 592-594 (5th Cir. 1998) (supervisor's malicious or recklessly indifferent acts imputed to employer for purposes of punitive damages); see generally *Faragher* v. *City of Boca Raton*, 118 S. Ct. 2275, 2290-2293 (1998); *Burlington Indus., Inc.* v. *Ellerth*, 118 S. Ct. 2257, 2270 (1998).

Through the text of Section 1981a, Congress has thus ensured that punitive damages are available—but not guaranteed—only in those cases that involve both unlawful intentional discrimination (or failure to accommodate) and also malice or reckless indifference to governing law. The court of appeals thought it implausible that Congress intended to exclude from punitive damages only cases involving a good faith mistake of law, leaving every "garden variety" disparate treatment case eligible for punitive damages. Pet. App. 18a. But in fact, Congress could reasonably conclude that in the absence of some reasonable belief in the lawfulness of the discriminatory conduct, all such acts of discrimination are sufficiently blameworthy and injurious as to be eligible for punitive damages. "After all, can it really be disputed that intentionally discriminating against a black man on the basis of his skin color," or a woman on the basis of her gender, "is worthy of some outrage?" *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 206 (1st Cir. 1987); see also *Smith*, 461 U.S. at 54 ("[S]ociety has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others.").

It is precisely because there are numerous areas of uncertainty at the margins of the anti-discrimination statutes that Congress found it necessary to distinguish between the standard for liability and the standard for punitive damages. The purpose of the additional criteria for punitive damages was not, as the court of appeals seemed to think, to limit punitive damages to a small number of defendants, but rather to limit punitive damages to those defendants who were sufficiently culpable—without regard to their number. Whether the punitive damages standard, in practice, embraces a few, many, or most intentional Title VII cases is entirely beside the point. This is a case of statutory construction, and it is Congress's judgment, as expressed in the statutory text, that must control. *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979) ("The ultimate question

is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

C. Analogous Civil Rights Legislation And General Tort Principles Support Permitting Punitive Damages Based On Malice Or Reckless Indifference To Federal Law, Without Any Additional Requirement Of Egregious Misconduct

1. The malice or reckless indifference standard for punitive damages, without an egregiousness requirement, is consistent with the governing standard for punitive damages under other civil rights laws.[12] As noted, liquidated damages under the ADEA are available when an employer "knows or recklessly disregards the illegality of its conduct," with no additional showing of "outrageous[ness]" required. *Hazen Paper*, 507 U.S. at 616, 617. Likewise, punitive damages are available in actions brought under 42 U.S.C. 1983 "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56. That same standard has been held to govern actions under 42 U.S.C. 1981, 1982, and 1985, and the Fair Housing Act, 42 U.S.C. 3613(c)(1).[13]

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[12] A standard that focuses on the defendant's reckless indifference to its legal obligations, rather than the nature of the underlying conduct, is also consistent with numerous other federal statutes authorizing punitive damages. See, *e.g.*, 11 U.S.C. 363(n) ("willful disregard" of the law); 15 U.S.C. 78u(h)(7)(A)(iii) (where violation of law is "willful, intentional, and without good faith"); 18 U.S.C. 2724(b)(2) ("willful or reckless disregard of the law"); 42 U.S.C. 300aa-23(d) ("intentional" violations); 42 U.S.C. 14503(a)(3) ("conscious, flagrant indifference to" rights).

[13] See, *e.g.*, *Barbour* v. *Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (under Section 1981, *Smith* standard governs and "[n]o additional evidence is required."), cert. dismissed, 516 U.S. 1155 (1996); *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 909 (2d Cir. 1993) (Fair Housing Act); *United States* v. *Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (Fair Housing Act), cert. denied, 510 U.S. 812 (1993); *Asbury* v. *Brougham*, 866 F.2d 1276, 1282 (10th Cir. 1989) (Section 1982); *Stephens* v. *South Atlantic Canners, Inc.*, 848 F.2d 484, 489-490, 492 & n.6 (4th Cir.) (Section 1981), cert. denied, 488 U.S. 996 (1988); *Rowlett*, 832 F.2d at 206 (rejecting additional "extraordinary" or "outrageous" criterion for punitive damages under Section 1981); *Handy Button Mach. Co.*, 817 F.2d at 1296 (Section 1981); *Walters*, 803 F.2d at 1147 (Section 1981); *Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1266 (7th Cir. 1984) (applying *Smith* standard to action under 42 U.S.C. 1985); *Hobson* v. *Wilson*, 737 F.2d 1, 63 (D.C. Cir. 1984) (Section 1985), cert. denied, 470 U.S. 1084 (1985); see also *Fischl* v. *General Motors Acceptance Corp.*, 708 F.2d 143, 148 (5th Cir. 1983) ("reckless disregard" of law sufficient for punitive damages under the Equal Credit Opportunity Act, 15 U.S.C. 1691e(b)); *Anderson* v. *United Finance Co.*, 666 F.2d 1274, 1278 (9th Cir. 1982) (same); but see *Beauford* v. *Sisters of Mercy-Province of Detroit, Inc.*, 816 F.2d 1104, 1109 (6th Cir.) (requiring egregious conduct for an award of punitive damages under Section 1981), cert. denied, 484 U.S. 913 (1987).

Nothing in the text of Section 1981a warrants imposition of a stricter standard for punitive damages for Title VII or Disabilities Act violations than applies under those other civil rights laws. To the contrary, the fact that Congress specifically articulated a standard for punitive damages in Section 1981a, and did not rely on the courts to create a standard as it did with Sections 1981, 1983, and 1985, counsels strongly against judicial amendment of Congress's chosen terms.[14]

2. Congress's decision to focus liability for punitive damages on the employer's malice or reckless indifference to legal obligations, rather than the egregiousness of the underlying conduct, is also consistent with general principles of tort law. See generally *Shabani*, 513 U.S. at 12 (absent contrary indication, statutes are construed consistent with the common law). As this Court noted in *Smith*, *supra*, by

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[14] The legislative history confirms Congress's intent to harmonize the damages standards under federal civil rights laws. See H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 1, at 64-65, 70, 74 (1991); H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 2, at 24, 29 (1991).

the mid 1980s, "[m]ost cases under state common law * * * recogniz[e] that punitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others." 461 U.S. at 47-48; see also *id.* at 48 n.13 (citing cases). Egregiousness is not required. Thus, the standard Congress enacted for punitive damages in Section 1981a, including its omission of an egregiousness requirement, comports with the governing common law at the time Section 1981a was enacted.

Congress's standard also echoes the punitive damages rule recognized by the Restatement of Torts, which provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1979). According to the Restatement, the actor's evil motive or reckless disregard is precisely what renders his actions "outrageous" and thus "provide[s] the necessary state of mind to justify punitive damages." *Id.* at cmt. b.[15]

[15] Even if Congress's standard departed from the common law, that would not justify the court's creation out of whole cloth of additional limitations on punitive damages. The rule that statutes will be construed in accord with the common law applies only when Congress has not "otherwise instructed." *Molzof* v. *United States*, 502 U.S. 301, 307 (1992) (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)). Congress's explicit articulation of the governing standard for punitive damages in Section 1981a would have to be considered a "contrary indication[]" signaling departure from the common law. *Shabani*, 513 U.S. at 13. Furthermore, this Court has recognized that "common-law principles may not be transferable in all their particulars to Title VII." *Faragher*, 118 S. Ct. at 2285 (quotation marks omitted).

D. The Legislative History Supports Permitting Punitive Damages Based On Malice Or Reckless Indifference, Without Any Additional Requirement Of Egregious Misconduct

1. Because Section 1981a's language is plain in establishing a governing standard for punitive damages, "the sole function of the courts is to enforce it according to its terms." *Ron Pair*, 489 U.S. at 241 (internal quotation marks omitted). Given the precision with which Congress has spoken, "reference to legislative history * * * is hardly necessary." *Ibid.* Snippets from the legislative history alone thus cannot justify the creation of an extra-statutory doctrine that finds no home in the text Congress enacted. See *Shannon*, 512 U.S. at 584.

In any event, the legislative history supports a straightforward application of the statutory text, without an egregiousness requirement. Indeed, the House Report notes the different focus of the liability and punitive damages inquiries:

> Plaintiffs must first prove intentional discrimination, * * * and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages.

H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 1, at 72 (1991). Egregiousness is not included in the description of this standard. The Report reiterated this standard a few pages later, and noted that the statute set the same standard that courts have applied under Section 1981. *Id.* at 74 (citing *Rowlett*, *supra*, and *Smith*, *supra*). That explicit reference to this Court's decision in *Smith* and the fact that the statutory text echoes *Smith*'s standard for punitive damages, which does not require egregiousness, augurs strongly in favor of applying the statutory text as written. See also

H.R. Rep. No. 40, *supra*, Pt. 1, at 112 (reiterating statutory standard without reference to egregiousness); H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 2, at 29 (1991) (reiterating statutory standard and citing with approval *Smith* and *Stallworth* v. *Shuler*, 777 F.2d 1431, 1435 (11th Cir. 1985), neither of which required egregiousness).[16]

The minority views expressed in the House Report, moreover, warned of the potential breadth of the punitive damages provision as enacted. H.R. Rep. No. 40, *supra*, Pt. 1, at 143-144 n.14 ("[O]ne might ask when, if ever, a jury would find that proven intentional discrimination by an employer did not constitute the requisite level of abuse."). The legislative standard, however, was not altered in response to this complaint. Congress thus cannot be presumed to have been unaware of the frequency with which punitive damages claims might be presented to a jury.

Floor statements also indicate that Congress did not intend to import additional, unwritten limitations into the punitive damages provision. "Punitive damages are available * * * to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed." 137 Cong. Rec. 30,662 (1991) (Rep. Edwards).

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[16] In stating its intent to adopt the standard governing punitive damages under Section 1981, the House Report also cited to *Beauford* v. *Sisters of Mercy-Province of Detroit, Inc.*, *supra*. H.R. Rep. No. 40, *supra*, Pt. 1, at 74. That decision does seem to require egregiousness, although it did so without much analysis. *Beauford*, 816 F.2d at 1109. When considered against the backdrop of repeated iterations of the statutory standard and the reference to *Smith*, that isolated citation does not provide the type of compelling evidence of congressional intent necessary to cast doubt on the language Congress actually adopted. See *Hubbard* v. *United States*, 514 U.S. 695, 708 (1995) ("Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress.").

Some statements in the House Report and from the floor do suggest that punitive damages will be awarded only in egregious cases.[17] The word "egregious," however, is commonly used as shorthand for "more culpable" conduct. Such usage would be perfectly consistent with the statutory text as enacted, if the references to "egregious" refer to the culpability that results from acting with malice or reckless disregard of another's rights. Indeed, the Restatement of Torts uses the word "outrageous" in precisely this manner. Restatement (Second) of Torts § 908(2); see also *Hernandez-Tirado* v. *Artau*, 874 F.2d 866, 869 (1st Cir. 1989) (same). Because the legislators did not clearly indicate an intent that egregiousness be applied by courts as an additional criterion external to the statutory text and, in fact, imply by their votes acceptance of the statutory language as enacted, the better reading of those legislative comments is simply that Members of Congress considered any conduct in violation of the statutory "malice or reckless indifference" standard to be, by definition, egregious.

In any event, to the extent some legislators had a different view, those comments are insufficient to overcome the plain statutory text and its supporting legislative history. See *Hubbard* v. *United States*, 514 U.S. 695, 703 (1995 ("[A] historical analysis normally provides less guidance to a statute's meaning than its final text."). Indeed, as this Court recognized in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), the legislative history of the 1991 Civil Rights Act can be uniquely unhelpful in construing the Act's terms because it is loaded with "frankly partisan statements" that "cannot plausibly be read as reflecting any general agreement." *Id.* at 262; see also *id.* at 263 n.15 (" '[A] court would be well advised to take with a large grain of salt floor

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[17] See, *e.g.*, H.R. Rep. No. 40, *supra*, Pt. 1, at 65, 91; H.R. Rep. No. 40, *supra*, Pt. 2, at 3; 137 Cong. Rec. 30,661 (1991) (Rep. Edwards); *id.* at 30,678 (Rep. Hyde); *id.* at 29,035 (Sen. Dole); *id.* at 29,046 (Sen. Danforth).

debate and statements placed in the CONGRESSIONAL RECORD which purport to create an interpretation for the legislation that is before us.'" (quoting 137 Cong. Rec. 28,856 (1991) (Sen. Danforth)).[18]

2. The 1991 Civil Rights Act reflected extensive compromise and negotiation on the part of Congress and the White House. One area of contention, in particular, concerned the proper balance to be struck between the need to award punitive damages for deterrence purposes and the desire to protect small businesses from runaway jury awards. As the legislation left the House, it contained no cap on damages.[19] Damages caps were later added as a compromise to obtain the necessary support for the bill. See, *e.g.*, 137 Cong. Rec. 30,667 (1991) (Rep. Fish) ("The bill before us incorporates a cap on damages that seeks to accommodate employer concerns at the same time that we protect the civil rights of our work force.").[20]

The final legislation thus contained a delicate compromise that imposed caps on damages awards as a means of protecting businesses, while authorizing the award of punitive

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[18] See also 137 Cong. Rec. 30,683 (1991) (Rep. Ford) (in response to Rep. Hyde's legislative history remarks concerning, among other things, damages, Rep. Ford, "one of the authors of the bill," "categorically den[ies] [Rep. Hyde] was right on any one of his interpretations").

[19] See H.R. Rep. No. 40, *supra*, Pt. 1, at 125, 143 (objecting that the amendments to the damages provisions, which did not include a cap, would transform Title VII into "a litigation generating machine which will only benefit lawyers") (minority views); H.R. Rep. No. 40, *supra*, Pt. 2, at 52 n.2, 74.

[20] See also 137 Cong. Rec. 30,670 (1991) (Rep. Goodling) ("With respect to the litigation lottery that many feared would be the result of H.R. 1, the compromise takes several steps in the right direction. * * * The possibility of unlimited damages no longer serves as a carrot for filing a lawsuit under this compromise."); *id.* at 29,041-29,042 (Sen. Bumpers) (caps address business concerns about extent of liability); *id.* at 29,034 (Sen. Dole) ("With these caps, the incentive for frivolous lawsuits should be significantly reduced.").

damages in certain intentional discrimination cases to promote the goals of deterrence. See H.R. Rep. No. 40, *supra*, Pt. 1, at 18 (legislation "strengthen[ed] existing remedies to provide more effective deterrence"). The court of appeals' imposition of a new limitation that curtails the availability of punitive damages upsets that carefully calibrated balance. The court's interpretation offers businesses protection at both the onset of the damages stage, by foreclosing many awards of punitive damages, and at the conclusion of the process by significantly capping the damages ultimately recoverable by plaintiffs.

However, nothing in the legislative history suggests that Congress intended to provide two separate protections for employers in a bill designed largely to strengthen employee rights, increase employee compensation, and aggressively deter employer violations. To the contrary, Congress was frustrated that discrimination continued even though "[v]irtually everyone in America now understands that it is both 'wrong' and 'illegal' to discriminate intentionally." H.R. Rep. No. 40, *supra*, Pt. 1, at 14. Congress thus determined "to send a clear signal" that

> Congress is serious about halting job discrimination and one way to do that is to impose penalties that will make employers think twice about the financial consequences of violating the law. If employers will not do the right thing for its own sake, maybe they'll do it for the sake of their pocketbooks.

137 Cong. Rec. E3811 (daily ed. Nov. 7, 1991) (Rep. Collins); see also 137 Cong. Rec. 29,043-29,044 (1991) (Sen. Hatfield) ("[I]t is no less incumbent upon us to ensure that the laws of the United States offer no comfort to those who engage in discriminatory practices."); H.R. Rep. No. 40, *supra*, Pt. 1, at 64-65. Given the lengthy and hard-fought legislative battles that underlay the 1991 Civil Rights Act, this Court should be especially loath to adopt extra-statutory terms that sub-

stantially alter the compromises reflected in the statutory text that Congress enacted and the President signed.

E. The Purposes Of The 1991 Act Support Permitting Punitive Damages Based On Malice Or Reckless Indifference Without Any Additional Requirement Of Egregious Misconduct

1. Interpreting Section 1981a to permit punitive damages in all cases of intentional discrimination that is undertaken with malice or reckless indifference to the employer's legal obligations is consistent with the animating purposes of the 1991 Civil Rights Act. Congress was frustrated with "a history of noncompliance with known statutory requirements" by employers nearly thirty years after the passage of Title VII. *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996).[21] Consequently, a primary goal of the legislation was to provide "strong medicine" in the form of compensatory and punitive damages "to cure the defendant's disrespect for the law," *BMW*, 517 U.S. at 577, and to deter employers from violating Title VII and the Disabilities Act in the first instance.[22]

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[21] See, *e.g.*, H.R. Rep. No. 40, *supra*, Pt. 1, at 14 ("In the twenty-seven years since Title VII of the Civil Rights Act of 1964 was enacted, many employers have accepted its mandate that discrimination on the basis of race, gender, national origin, or religion has no place in employment decisions. Those who have not accepted that principle should no[w] be subjected to a damage remedy when they intentionally discriminate.").

[22] See, *e.g.*, H.R. Rep. No. 40, *supra*, Pt. 1, at 18 ("Section 2 of the legislation also sets forth Congress's dual purposes: to respond to the Court's recent decisions by restoring the civil rights protections * * * and to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination."); *id.* at 69-70 ("Allowing full compensatory and punitive damages . . . would provide a stronger incentive for employers to implement effective remedies for intervention and prevention, which I think is the real goal. Data suggests that employers do indeed implement measures to interrupt and prevent

The broad availability of punitive damages in cases of intentional and maliciously or recklessly undertaken discrimination was a key component of that deterrence scheme. See, *e.g.*, 137 Cong. Rec. 30,661 (1991) (Rep. Edwards) ("Punitive damages serve the important purposes of * * * reinforcing the public policy against discrimination and adding to the deterrent value of a damages award."); *id.* at 28,915 (Sen. Jeffords) ("Punitive damages are intended to punish discriminators and to deter further discrimination."); *Landgraf*, 511 U.S. at 283 n.35 ("The new damages provisions of § 102 can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs."). Indeed, punitive damages traditionally have served such a deterrence function.[23]

The court of appeals' whittling down of the class of employers subject to punitive damages frustrates Congress's goal of deterrence. Nothing in the legislative history suggests that Congress intended only to deter the most outlandish acts of intentional discrimination, while offering an economic cushion to those who flagrantly or recklessly violate the law in more subtle and less dramatic forms. Rather, the legislative history is replete with evidence that Congress's patience had run out across the board with those who persist in intentional discrimination in the face of well-established federal prohibitions.

2. Furthermore, the court of appeals' desire (Pet. App. 16a-19a) to limit dramatically the availability of punitive

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employment discrimination when they perceive that there is increased liability.") (quoting hearing testimony of Dr. Freada Klein).

[23] See, *e.g.*, *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15 (1991) (under common law, one key purpose of punitive damages is to "deter similar wrongful conduct"); *International Bhd. of Elec. Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *Gertz*, 418 U.S. at 350 (same).

damages overlooks the unique character of Title VII and Disabilities Act litigation. Title VII and the Disabilities Act are "but part of a wider statutory scheme to protect employees in the workplace nationwide" and are critical components "of an ongoing congressional effort to eradicate discrimination in the workplace." *McKennon* v. *Nashville Banner Pub. Co.*, 513 U.S. 352, 357 (1995).

Accordingly, as this Court has repeatedly recognized, a private litigant enforcing federal civil rights legislation "not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *McKennon*, 513 U.S. at 358; see also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974) (same). Because Title VII and Disabilities Act litigants "serve important national policies," *McKennon*, 513 U.S. at 360, they do not appear in court as ordinary, self-interested tort plaintiffs. Rather, they appear as private attorneys general giving effect to our "societ[y's] condemnation of invidious bias in employment decisions," *id.* at 357, whenever "even a single employee establishes that an employer has discriminated against him or her," *id.* at 358. Title VII and Disabilities Act suits are thus "private in form only." *Newman* v. *Piggie Park Enters.*, 390 U.S. 400, 401 (1968) (per curiam).[24]

The 1991 Civil Rights Act reconfirmed the special status of civil rights plaintiffs. The House Report explained that monetary damages are "also necessary to encourage citizens to act as private attorneys general to enforce the statute." H.R. Rep. No. 40, *supra*, Pt. 1, at 65. Further,

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[24] See also *Independent Fed. of Flight Attendants* v. *Zipes*, 491 U.S. 754, 759 (1989) (Title VII plaintiffs "act as private attorney[s] general, vindicating a policy that Congress considered of the highest priority"); *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981) ("Congress considered the charging party a private attorney general, whose role in enforcing the ban on discrimination is parallel to that of the [EEOC] itself.") (internal quotation marks omitted).

> [t]he individual Title VII litigant acts as a "private attorney general" to vindicate the precious rights secured by that statute. It is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest.

Id. at 47 (quoting hearing testimony of Jane Lang); see also 137 Cong. Rec. 30,661 (1991) (Rep. Edwards) ("Monetary damages are also necessary to encourage citizens to act as private attorneys general to enforce the law.").

Because Title VII and Disabilities Act actions serve a unique societal and governmental function, it is not surprising that Congress would also consider such suits to be particularly appropriate vehicles for the vindication of public policy through punitive damages awards. Punitive damages, after all, are designed to advance social and policy goals through the medium of individual litigation. See *BMW*, 517 U.S. at 568; *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15-16 (1991). Congress's frustration at the perpetuation of discriminatory practices makes it especially understandable that Congress would want to ensure that punitive damages are available (although not necessarily awarded) in every suit exposing intentional discrimination undertaken heedless of federal prohibitions on such conduct. After all, "[t]here is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring); see also *BMW*, 517 U.S. at 583 (courts "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue") (internal quotation marks omitted).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for reconsideration of the punitive damages issue in light of this Court's opinion.

Respectfully submitted.

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APPENDIX

42 U.S.C. § 1981a provides:

Damages in cases of intentional discrimination in employment.

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or

committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party–

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section–

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means–

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

Excerpts from Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2 provides in part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or

national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Excerpts from Title I of the Americans with Disabilities Act

42 U.S.C. § 12111 provides in part:

Definitions

* * * * *

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * * * *

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

* * * * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. § 12112 provides in part:

Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subj[illegible]ting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the

covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is

shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

* * * * *

42 U.S.C. § 12113 provides:

Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 1990, shall—

(A) review all infectious and communicable diseases which may be transmitted through handling the food supply;

(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;

(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissability[1] to the general public.

Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissability[1] published by the Secretary of Health and Human Services.

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[1] So in original. Probably should be "transmissibility."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

—v.—

AMERICAN DENTAL ASSOCATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND EQUAL RIGHTS ADVOCATES, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 attorneys who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants for employment on claims arising out of the workplace. NELA has participated as *amicus curiae* in numerous employment cases before the state and federal appellate courts as well as the United States Supreme Court. Recent cases include *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. __, 118 S. Ct. 998 (1998); *Oubre v. Entergy Operations, Inc.*, __ U.S. __, 117 S. Ct. 1466 (1997); *Wright v. Universal Maritime Corp.*, __U.S.__, 119 S.Ct. 391 (1998); *Haddle v. Garrison*, No. 97-1472, 1998 WL 856125 at *1 (U.S. Dec. 14, 1998); and *Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997).

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[1] Petitioner and Respondent have consented to the filing of this brief, *amici curiae.* The consents have been filed with the Clerk of this Court. No part of the attached brief has been authored by counsel for either party. No persons other than the *amici curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

NELA has a compelling interest in ensuring that the goals of Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act of 1990 are fully realized. Because of the critical role the awarding of punitive damages plays in the full enforcement of those statutes, NELA submits this brief to protect the interests of its members' clients by ensuring that punitive damages are available under the standards established by the United States Congress.

Equal Rights Advocates

Equal Rights Advocates, Inc. ("ERA") has dedicated itself for the past twenty-four years to achieving equality for women and girls. ERA has a long history of interest, activism, and advocacy in all areas of the law which affect equality between the sexes. ERA has been particularly concerned with equality in the work force because economic independence is fundamental to women's ability to gain equality in other aspects of society. As Title VII is one of the foremost federal laws designed to promote equality in the workplace and protect women from the devastation of discrimination, ERA has a particularly strong interest in the interpretation and implementation of Title VII through the courts. ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of Title VII, including *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, No. 3:89-0557,

1994 WL 792661 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, 118 S.Ct. 1115 (1998); and *Burlington Indus. v. Ellerth*, 524 U.S.__, 118 S.Ct. 2257 (1998).

SUMMARY OF THE ARGUMENT

This case presents the Court with an opportunity to clarify the proper standard for the awarding of punitive damages under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* and the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.* *Amici* propose that the Court reject the position of the District of Columbia Court of Appeals permitting punitive damages only upon a showing that the complained of conduct was "egregious" or "truly outrageous." Such a requirement is not in accord with either the plain language of the statute or the remedial purpose Congress intended when it amended the civil rights statutes to permit juries to award punitive damages.

In its place, *amici* propose that the Court adopt the standard enunciated by the First Circuit when it upheld the following district court jury charge: "Where a plaintiff in a racial discrimination case establishes the elements of malice, or callous indifference by a preponderance of the evidence, then a jury is allowed in its discretion to assess punitive damages against the discriminatory defendant for the purpose of punishment of such

defendant and as a deterrent to others." The First Circuit held that no evidence beyond that which was submitted on liability need be offered to establish entitlement to punitive damages, stating that:

> punitive damages are within the jury's discretion in cases requiring proof of intentional wrongdoing . . . In such cases, the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable. That does not mean that punitive damages are appropriate in each case of an intentional wrong, but rather that in each case the trier of fact has the discretion to determine whether punitive damages are necessary.

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 205 (1st Cir. 1987). *See also Hernandez-Tirado v. Artau*, 874 F.2d 866, 868 (1st Cir. 1989), quoting *Soderbeck v. Burnett County*, 752 F.2d 285, 289 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985) (jury may award punitive damages where the evidence supports a finding that "the defendant almost certainly knew that what he was doing was wrongful and subject to punishment"); *Criado v. IBM Corp.*, 145 F.3d 437, 445 (1st Cir. 1998); *Dichner v. Liberty*, 141 F.3d 24, 34 (1st Cir. 1998).

The standard enunciated by the First Circuit in *Rowlett* is fully consistent with that established by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In *Thurston*, this Court stated that "the reckless disregard standard" is met if an employer acts with a "disregard for the governing statute and an indifference to its requirements." 469 U.S. at 127.

The standard *amici* propose is not only consistent with the language of the 1991 Act, but advances its goal of deterring future unlawful conduct. In passing the 1991 Act, Congress recognized that the award of back pay damages alone had failed to impose a significant economic cost on employers who willfully discriminate, particularly in cases where the victim's economic damages were *de minimus*. Deterrence of future unlawful conduct depends upon the availability of punitive damages as a sanction in all cases where an employer discriminates with "malice" or with "reckless disregard" for an employee's protected rights.

Finally, any concern that allowing punitive damages under the standard herein proposed would lead to excessive or "runaway" jury awards is misplaced. Trial courts and appellate courts have the authority to reduce awards that are "so high as to shock the judicial conscience." *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) (citations omitted) Given this control, further po-

licing of punitive damages awards is both unnecessary and inappropriate.

ARGUMENT

I. THE *EN BANC* DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE PLAIN LANGUAGE OF THE CIVIL RIGHTS STATUTE

The *en banc* decision of the Court of Appeals, *Kolstad v. American Dental Ass'n*, 139 F.3d 958 (D.C. Cir. 1998), which requires victims of discrimination to prove that the acts of the employer were "egregious" and "truly outrageous" to warrant imposition of punitive damages, nullifies the plain language of the statutory provisions for punitive damages. Section 1981a states unambiguously that a victim of discrimination suing under Title VII or the ADA "may recover punitive damages" if she proves that the defendant acted "with malice or with reckless indifference to [her] federally protected rights." 42 U.S.C. §§ 1981a(a)(1) and (b)(1). Nowhere in the statute are the words, or indeed even the concepts, "egregious conduct," "outrageous behavior" or "outrageous acts of discrimination" to be found. Undoubtedly, those words exist in the lexicon of Congress, but the Members chose not to incorporate them into the

statute.[2] It is not for the courts to now engraft upon the plain language of the statute a higher standard of proof than that stated explicitly by Congress.

This Court has consistently warned against searching the collective mind of Congress when the statutory language is unambiguous. As explained in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> First, always, is the question whether Congress has directly spoken to the precise

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[2] The legislative history supports this conclusion. The congressional debate regarding punitive damages was particularly contentious, where clearly contradictory statements were made along partisan lines. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994). For example, the analysis offered by Rep. Hyde, 137 Cong. Rec. H9543 (1991) and Sen. Dole, 137 Cong. Rec. S15473 (1991) asserting an "extraordinarily egregious" standard, was completely repudiated by Rep. Ford, a sponsor of the bill, who said:

> Mr. Speaker, I listened carefully to the legislative history that the gentleman from Illinois [Mr. Hyde] tried to create for this bill, and, as one of the authors of the bill, I can categorically deny that he was right on any one of his interpretations.

137 Cong. Rec. H9549 (1991).

> question at issue. If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.

Chevron USA, at 842-43. Further, the words used in the statute should be given their "ordinary meaning." *Moskal v. United States*, 498 U.S. 103 (1990).

Nor is the term "reckless indifference" to protected federal rights in any way ambiguous, thus requiring this Court to search further through the Congressional record for a hidden intent or meaning in the mind of the legislature. To the contrary, this Court has held that it is "not persuaded that a recklessness standard is too vague to be fair or useful." *Smith v. Wade*, 461 U.S. 30, 49 (1983). Since *Smith v. Wade*, this Court has twice endorsed the recklessness standard as the touchstone for punitive damages. *See Thurston*, 469 U.S. at 126-127 (adopting the unambiguous standard of "reckless disregard" of federally protected rights to define what is meant by willful conduct establishing violation of the Age Discrimination in Employment Act); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993). Indeed, if courts require assistance in interpreting the term "reckless indifference," there is an immense body of case law available to them. *See Hazen*, 507 U.S. at 616-17 (employer acts recklessly when he or she "more

likely knows its conduct to be illegal"); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) ("reckless indifference" refers to "the mental state with which the defendant commits the crime"). It would contravene accepted rules of statutory construction to read the terms "egregious" or "outrageous" into the standard for awarding punitive damages.

Congress' incorporation of a provision capping punitive damages[3] based on the size of the defendant employer further supports Petitioner's position that punitive damages do not require proof of egregiousness. Congress drafted Section 1981a to provide that the size of the company controls the award of punitive damages, regardless of the nature or severity of the offense.

When viewed as a whole, the language Congress used in Section 1981a(b)(1) -- "with malice or with reckless indifference to the federally protected rights of an aggrieved individual" -- clearly precludes a requirement of extraordinarily egregious or outrageous conduct for entitlement to punitive damages. Moreover, a plain reading of the statutory language is in full accord with

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[3] Section 1981a(b)(3) provides that a compensatory and punitive damages award shall not exceed $50,000, $100,000, $200,000 or $300,000, depending upon the size of the employer.

the definition of recklessness adopted by this Court in *Thurston* and *Hazen*.

II. THE "EGREGIOUS" STANDARD ENDORSED BY THE COURT BELOW UNDERMINES THE DETERRENT VALUE OF PUNITIVE DAMAGES WITH RESPECT TO AN ENTIRE CLASS OF CASES INVOLVING INTENTIONAL DISCRIMINATION

A primary purpose of federal civil rights legislation is the deterrence of future unlawful conduct. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Such deterrence is best achieved through a statutory scheme which imposes an economic cost on employers who intentionally discriminate. *See Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (noting in the context of a suit under 42 U.S.C. § 1983 that "the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future").

Unfortunately, Title VII and the ADA, as originally formulated, were deficient in this regard. A victim of unlawful discrimination who quickly mitigated her back pay damages by locating replacement employment could obtain no monetary relief from the court. Likewise, an employee who incurred slight or *de minimus*

economic injury because she remained in the workplace while suffering harassment or discrimination was unable to obtain any monetary remedy, despite the fact that she vindicated important national civil rights policies through her role as a "private attorney general." *Rivera*, 477 U.S. at 575, citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). These deficiencies led Congress to conclude that the exclusive remedy of back pay constituted "a powerful disincentive for victims to seek to vindicate their rights." H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 70 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 608.

In 1991, Congress added punitive damages as a remedy under Title VII and the ADA as a result of a legislative finding that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(1), 105 Stat. 1071 (1991). Congress was motivated to expand the law because it recognized that the economic remedies previously available under Title VII, primarily back pay, were frequently insufficient to compensate the victims of discrimination and to insure that meritorious cases were pursued. *See, e.g.* H.R. Rep. No. 40(I), at 68 ("all too frequently, Title VII leaves prevailing plaintiffs without remedies for their injuries and allows employers who discriminate to avoid any meaningful liability");

see also H.R. Rep. No 40(II), at 25-27. The intent of Congress was clear: to impose an economic cost for intentional discrimination where one might otherwise not have existed, thereby establishing a strong remedial mechanism to deter discrimination. Punitive damages are well suited to accomplish this goal, as their fundamental purpose is to cause sufficient financial impact to deter future illegal conduct. *TXO Production Corp. v. Alliance Resource Corp.*, 509 U.S. 443, 459-60 (1993).

The case law and facts bear out Congress' conclusion that an award of back pay damages alone is insufficient to deter intentional discrimination. In an overwhelming number of cases, the actual economic losses are so low -- because the victim effectively mitigated her damages or because she was a low wage worker -- that a recalcitrant employer would find it cost effective to continue to discriminate. A brief survey of cases exemplifies the need for punitive damages to deter future unlawful conduct.

In *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995), the plaintiff was raped and sodomized by her supervisor on several occasions. She was forced to engage in oral sex and anal sex, while held in a locked room by her supervisor. Plaintiff was told by her supervisor that if she did not obey him, she could pack her bags and leave. Plaintiff decided that she could not

take it anymore and quit. She prevailed on most counts in her lawsuit, but her back pay loss was only $22,320.

Likewise, in *Harris v. L & L Wings, Inc.*, 132 F.3d 978 (4th Cir. 1997), the two plaintiffs were physically and verbally harassed on an almost daily basis by the floor manager who supervised them. The offensive behavior included incidents of grabbing, swats on the rear end, embracing, stroking their hair, massaging, fondling their legs, following them around the warehouse, boasting about his sexual prowess, offers of promotion or money in exchange for dates or sex, and other vulgar comments by the manager. The plaintiffs were ultimately terminated. Notwithstanding the magnitude of the harassment, the compensatory damages for Harris was merely $6,933 and for Prasky, $5,915.

Similarly, in *Howard v. Burns Bros., Inc.*, 149 F.3d 835 (8th Cir. 1998) the plaintiff was physically and verbally harassed by a co-worker on an almost daily basis. Plaintiff finally quit after management took no steps to act on complaints by her and other women at the company. Plaintiff, however, mitigated her damages immediately by finding a new job. As a result, her compensable economic loss was only $4,400.

In *McKnight v. Circuit City Stores, Inc.*, No. 3:95CV964, 1997 WL 328638, at *1 (E.D. Va. 1997), *rev'd in part on other grounds*, 158 F.3d 742 (4th Cir.

1998) the employer was found liable for race discrimination in promotions. Two of the plaintiffs were awarded a total of only $6,500 in back pay.[4]

In *Frazier v. Southwestern Pennsylvania Transp. Auth.*, 814 F. Supp. 11 (E.D. Pa. 1993) the plaintiff established that defendant violated her rights under Title VII. However, she was awarded only $11,170 in back pay.

Finally, in *Mahoney v. Canada Dry Bottling Co.*, 94 Civ. 2924 (FB), 1998 WL 231082, at *1 (E.D.N.Y. 1998) the plaintiff succeeded on claims that his employer discriminated against him on the basis of his race and his age. However, he was awarded only $6,074 in back pay damages.

The case law is replete with similar incidents of *de minimis* economic damages. *See, e.g. Berry v. Os-*

[4] *McKnight* stands as a disturbing illustration of the importance of punitive damages as a deterrent to discrimination. Despite recognizing that defendant "did not promote [plaintiffs] Lowery and Petersen because of their race," the court of appeals vacated the award of punitive damages because the defendant's conduct was not "so egregious" as to warrant the submission of punitive damages to the jury. The two plaintiffs were left with a total damages award--including compensatory and back pay damages--of only $16,700. *McKnight*, 158 F.3d at 765-768.

walt, 143 F.3d 1127 (8th Cir. 1998) ($40,000 in compensatory damages, no economic damages); *Conway Chevrolet-Buick, Inc. v. Travelers Indemnity Co.*, 136 F.3d 210 (1st Cir. 1998) ($5,000 in compensatory damages); *Defenbaugh-Williams v. Wal-Mart Stores Inc.*, 156 F.3d 581 (5th Cir. 1998) ($19,000 in lost earnings); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998) (no compensatory damages awarded); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) ($1.00 in back pay); *Ford v. Rigidply Rafters*, 984 F.Supp. 386, 391 (D. Md. 1997) ($46,159 in back pay); *Quaratino v. Tiffany & Co.*, 129 F.3d 702 (2nd Cir. 1997) ($60,000 in compensatory damages); *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996) ($43,000 in lost wages); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996) ($7,500 in compensatory damages); *Gares v. Willingboro Township*, 90 F.3d 720 (3rd Cir. 1996) ($24,000 in compensatory damages); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996) ($26,284.29 total back pay for two plaintiffs); *Poindexter v. Atchison*, 1996 U.S. Dist. LEXIS 13160 (D. Kan. 1996) ($36,729 in back pay); *Clark v. Sims*, 894 F. Supp. 868 (D. Md. 1995) ($1.00 in compensatory damages); *Daniel v. Loveridge*, 32 F.2d 1472 (10th Cir. 1994) ($12,360 in back pay). Indeed, Ms. Kolstad herself was awarded only $52,718 in back pay. 108 F.3d 1431, 1435 (D.C. Cir. 1997).

It is clear that if punitive damages are limited to only the most egregious of cases, the deterrent mechanism Congress intended will be eviscerated if not totally nullified. On the other hand, adopting the interpretation compelled by the plain language of Section 1981a will not lead to an award of punitive damages in every case of intentional discrimination. No jury is ever instructed that an award of exemplary damages is required; indeed, as this Court has explained in the context of the Age Discrimination in Employment Act, such damages should not be awarded where "an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular . . . decision . . . ." *Hazen*, 507 U.S. at 616.

However, it is imperative that a jury be permitted to use its own moral compass in assessing whether the employer acted with "malice or with reckless indifference to [the employee's] federally protected rights." The possibility of an award of punitive damages is a keystone of deterrence, for it sends the message that no employer can intentionally discriminate with the knowledge that no jury could ever sanction the conduct. Conversely, denying a jury the ability to award such damages would foster an attitude of impunity among recalcitrant employers and once again leave employees in this country with a civil rights enforcement scheme that

creates "a powerful disincentive for victims to seek to vindicate their rights." H.R. Rep. No. 40(I), at 70.

III. ANY CONCERNS REGARDING OUTRAGEOUS JURY AWARDS ARE UNJUSTIFIED

In opposing jury consideration of punitive damages, Respondent may raise the specter of "runaway" and "excessive" jury awards. That precise argument was rejected by Congress when it amended Title VII and the ADA to allow for jury damage awards. *See* House Rep. No. 40(I), at 65 ("[t]wo decades of experience with monetary damages for intentional race discrimination in employment suggests that damages will neither unduly foster litigation, nor result in disproportionate or "million-dollar" jury awards . . . ."). Congress' decision to allow Title VII and ADA plaintiffs access to a jury of their peers evidences a policy choice that juries, rather than judges, should render moral judgment on a particular employer's conduct.

The ruling by the court below removing that authority from the jury evinces, in essence, a distrust of the jury system at odds with this nation's jurisprudence. *See BMW of North America v. Gore*, 517 U.S. 559, 568 (1996) ("[m]ost States that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and

deterrence"); *see also Gore*, 517 U.S. at 613 (Scalia, J., dissenting) (urging deference to "the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury. . . .").

Concerns about excessive jury awards are also unreasonable in light of the existing limitations on an employer's exposure. Punitive damages awarded under Title VII and the ADA are presently capped based on the size of the defendant corporation.

In addition, while it is the job of the jury to set punitive damages, courts are not left without the ability to review certain damage awards. District Court judges are the ultimate gatekeepers protecting against outrageous awards, and, in fact, have exercised their discretion to reduce awards where appropriate, giving due deference to the strictures of the Seventh Amendment. *See Vasbinder*, 976 F.2d at 121.

The above safeguards substantially limit the defendant's financial exposure in employment discrimination litigation. Additional policing of punitive damage awards is neither supported by the language of the 1991 Act nor required by the Constitution, and should be rejected by this Court.

CONCLUSION

For the reasons stated in this brief, *amici* ask this Court to reverse the opinion of the lower court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; THE NATIONAL WOMEN'S LAW CENTER; THE NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND; THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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I. STATEMENT OF INTEREST[1].

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization, founded in 1963 by the leaders of the American Bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging racial discrimination in employment.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland

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[1/]Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the amici state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the amici and their counsel, made any monetary contribution to its preparation or submission.

where it maintains its national headquarters. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States. MALDEF is particularly dedicated to securing such rights in the areas of employment, education, immigration, political access and public resource equity. The question presented by this case is of great interest to MALDEF because it implicates the scope of the remedies available to victims of discrimination, as well as how courts should view the act of intentional discrimination itself.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the United States Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. NWLC has worked since 1972 to secure equal opportunity

in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, and NWLC played a leading role in urging the enactment of the Civil Rights Act of 1991, and in particular its inclusion of compensatory and punitive damages as remedies for victims of sexual harassment and other forms of sex discrimination.

The National Organization for Women Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women as a separate organization. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting employment discrimination. NOW LDEF has appeared before this Court, both as direct counsel and as *amicus*, in numerous employment discrimination cases.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Title VII is one of the nation's most important antidiscrimination statutes and its effective enforcement is therefore a matter of great concern to the ACLU and its members. The ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

All of the *amici* were closely involved with the enactment of the Civil Rights Act of 1991, and in particular with the provision of common-law damages as a remedy for

intentional discrimination under Title VII of the Civil Rights Act of 1964 and under other civil rights laws. The *amici* provided information to Congress through testimony on behalf of the organizations, through contacts with members of Congress and their staff, through explanations provided to Committee staff, and through the identification of victims and other potential witnesses for Committee staff to consider as potential witnesses in hearings.[2]

II. SUMMARY OF ARGUMENT.

The 1991 Civil Rights Act (the "Act"), provides, in relevant part:

> A complaining party may recover punitive damages under this section . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice *or with reckless indifference* to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (emphasis supplied). The plain meaning of this provision is that once a plaintiff has put forward sufficient evidence to go to the jury on the issue of intentional discrimination, he or she may also go to the jury on the question of punitive damages, if the defendant's conduct was undertaken with malice or reckless indifference to the plaintiffs' legal rights.

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[2] *See*, for example, the Report of the Senate Committee on Labor and Human Resources, S. REP. 101-315 (101st Cong., 2d Sess.) at 8-9 (1990) (listing witnesses); the Report of the House Committee on Education and Labor, H. REP. 102-40(I) (102nd Cong., 1st Sess.) at 17-18, 1991 U.S.C.C.A.A.N. 549, 555-56 (listing witnesses); statement of Sen. Kennedy, 136 Cong. Rec. S 9969 (daily ed., July 18, 1990).

The *en banc* majority opinion below in *Kolstad v. American Dental Ass'n.*, 139 F.3d 958 (D.C. Cir. 1998), held that punitive damages may be imposed in a Title VII case only upon a showing that the employer acted with actual malice or that its conduct was "egregrious." In so holding, the *en banc* majority interprets the Act in a manner that conflicts with its plain meaning, that conflicts with Congress' stated purposes in enacting the Act, and that conflicts with well-settled precedent in anti-discrimination law. The *en banc* majority opinion creates a standard for punitive damages that would unduly burden plaintiffs seeking recovery from defendants who intentionally discriminated against them with reckless indifference to their rights.

To create its standard that punitive damages in a Title VII case may be imposed only on a showing of egregious conduct, the *en banc* majority below engaged in a tortured analysis of the statute, necessarily either removing the phrase "reckless indifference" from it, or adding the phrase "egregious conduct" to it. Neither possibility is consistent with the plain meaning of the statute. This Court has repeatedly rejected such an approach, most recently in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), refusing to engraft onto the ADEA an "outrageous conduct" standard identical to the "egregious conduct" standard that the *en banc* majority adopts with respect to Title VII. *Id.* at 615-16. In enacting Section 1981a(b)(1) Congress legislated against the backdrop of a line of cases — including *Smith v. Wade*, 461 U.S. 30 (1983), and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) — that had established a precise meaning for the concept of "reckless indifference," that this Court unanimously reaffirmed in *Hazen*. The Act should be read in a manner consistent with its plain meaning, consistent with Congress' express purpose in enacting it, and consistent with this Court's precedents.

III. ARGUMENT.

A. History of the Act.

One of the fundamental problems driving the effort to pass the Civil Rights Act of 1991 was the inadequacy of remedies for intentional violations of Title VII. For example, if the only relief available for a sexually discriminatory denial of promotion was back pay and the possibility of an order of instatement, the plaintiff had to engage in a legal effort disproportionate to the limited back pay at stake, and could not recover anything for the stress or humiliation she may have suffered. In some instances, the victim's rights were grievously violated but she was left without any remedy because she lost no pay from the violation, and could not benefit from an injunction because she had left the workplace for nondiscriminatory reasons.[3] The Reports of the House

[3]*E.g.*, *Swanson v. Elmhurst Chrysler Plymouth*, 882 F.2d 1235, 1240 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990). Patricia Swanson, the plaintiff, was found to have been sexually harassed but lost no pay because of it and lost her job for other reasons. She did not obtain even a dollar in nominal damages because of the lack of a damages remedy, so the court reversed her award of attorneys' fees and ordered that judgment be entered for the defendant. Her proof of sexual harassment was not even adequate under the law at the time to spare her the additional humiliation of being forced to pay her harasser's court costs. Barbara Mathias, *Washington Post*, November 5, 1991, p. B5, "The Harassment Hassle; Women Who Win Their Suits Sometimes Seem to Pay the Higher Price." Indeed, Ms. Swanson testified at a Congressional hearing on the vetoed 1990 precursor of the Civil Rights Act of 1991. Report of the Senate Committee on Labor and Human Resources, S. REP. 101-315 (101st Cong., 2d Sess.) at 8 (listing the witnesses at the February 27, 1990, hearing).

Committee on Education and Labor, and of the House Committee on the Judiciary, are replete with such examples.[4]

In addition, the remedies available for intentional violations of Title VII did not include the common-law compensatory and punitive damages that are available for violations of 42 U.S.C. § 1981 and for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. The Title VII remedies did not even include the punitive "liquidated damages" available for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 626(b). As a result, in our view, many employers felt before November 21, 1991, that the stakes did not justify any rigorous program of preventing or curing discrimination that violates Title VII.

For more than twenty years, this Court has recognized the importance of an adequate financial "spur" or "catalyst" to prod employers to examine their practices and prevent discrimination from occurring. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), this Court emphasized the importance of deterring discrimination and stated:

> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide(s) the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to

[4]H.REP. 102-40(I) at 66-69, 1991 U.S.C.C.A.A.N. 549, 605-07; H.REP. 102-40(II) at 24-28, 1991 U.S.C.C.A.A.N. 694, 717-21.

> eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

(citation omitted.) *Faragher v. City of Boca Raton*, ___ U.S. ___, ___, 118 S. Ct. 2275, 2292, 141 L. Ed 2d 662 (1998), continued the Court's emphasis on the deterrence of discrimination and on framing rules of law to encourage employers to prevent discrimination:

> It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.

In *Faragher*, this Court also referred to "Title VII's equally basic policies of encouraging forethought by employers." *Id.* The lack of punitive and compensatory damages prior to the 1991 Act meant that the "spur or catalyst" was too weak to serve its intended function.

In countless meetings, *amici* explored with members of Congress the experiences of numerous litigants that illustrated the need for both types of common-law damages. After two years of consideration, Congress agreed. Section 3 of the Civil Rights Act of 1991 stated that the "purposes of this Act" are in part "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace." Pub. L. 102-166, 105 Stat. 1071.

The need for a stronger deterrent to intentional discrimination was a driving force for the provision of compensatory and punitive damages. Based in large part upon the information provided by *amici*, Congress determined that back pay and front pay were insufficient to deter and prevent discrimination.[5] Section 2 of the 1991 Act states that Congress finds that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace," and that "legislation is necessary to provide additional protections against unlawful discrimination in employment." *Id.*

Congress clearly intended the provision of punitive damages to provide part of the cure for the problems it saw. Narrowing the applicability of this remedy so as to make it unavailable in most cases defeats the intent of Congress and reinstates the problems Congress sought to cure. Such a narrowing assumes that compensatory damages alone will be sufficient to satisfy the purposes of Congress. Postponing for a moment discussion of the fact that this is not what Congress enacted, we submit that the inadequacy of compensatory damages alone is plain from the nature of the difference between the two types of common-law damages.

Compensatory damages under the 1991 Act are exclusive of back pay and all of the relief traditionally awarded under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). Their measure is generally the extent of the emotional distress

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[5]Report of the House Committee on Education and Labor, H.REP. 102-40(I) at 69-71, 1991 U.S.C.C.A.A.N. 549, 607-09; Report of the House Committee on the Judiciary, H. REP. 102-40(II) at 27, 1991 U.S.C.C.A.A.N. 694, 721.

suffered by the plaintiff or class member,[6] and is sometimes modest.[7] The measure of punitive damages is the extent of the culpability of the defendant's mental state and the amount necessary to deter the defendant from engaging in repetition of the conduct.[8] Because victims vary greatly in their individual injuries, some compensatory damages awards are substantial and others are modest. However, neither a substantial nor a modest recovery of compensatory damages addresses the severity of the defendant's culpability nor the question of whether the amount awarded is sufficient to deter the defendant from future violations as to the plaintiff or others.

Barring awards of punitive damages in the vast majority of cases will undo one of the most salutary provisions in the Civil Rights Act of 1991, effectively repealing a significant

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[6]Proof of the victim's emotional injury is often supported by expert testimony or by the detained testimony of the victim or of the victim's friends or family members. *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996); *Annis v. County of Westchester*, 136 F.3d 239 (2d Cir. 1998); *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir.), *cert. denied*, 519 U.S. 1028 (1996); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997).

[7]*E.g., Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344 (7th Cir. 1995) (jury found liability but did not award compensatory damages); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996) ($2,500 to each plaintiff as compensatory damages for emotional distress); *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 581 (7th Cir. 1996) (reducing $25,000 award by 25%). Remittiturs must, of course, be exercised in a manner consistent with the Seventh Amendment right of trial by jury.

[8]*City of Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.").

remedy adopted by Congress after a great national debate, and once again leaving many victims of intentional civil rights violation without an adequate remedy. Victims in the vast number of cases, which the court below characterized as "garden variety," may once again find it hard to obtain counsel, and employers will have a significantly reduced incentive to monitor and correct the discriminatory actions of their supervisors and other officials. *Amici* submit that the lower court should have respected, rather than replaced, the judgment of Congress.

B. The *En Banc* Majority Opinion is at Odds with the Plain Meaning of the Statute; The "Reckless Indifference" Provision Cannot Be Read to Require Either "Egregious Conduct" or "Outrageousness".

The most basic of all canons of statutory construction is that the starting point for any inquiry into the meaning of a statute is its words, and that statutes mean what they say. It is not the province of courts to read language into or out of statutes that are unambiguous. As Chief Justice Marshall wrote almost two centuries ago:

> [The] intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed, which would justify a court into parting from the plain meaning of the words . . . in search of an intention which the words themselves did not suggest.

United States v. Wiltberger, 5 Wheat. 76, 95-96 (1820). Justice Black similarly wrote for the Court in *Unexcelled Chemical Corp. v. U.S.*, 345 U.S. 59 (1953),

> Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in legislative language that must be resolved. But when Congress . . . has used language which plainly brings a subject matter into a statute, its word is final. . . .

Id. at 64. *See also Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 470 (1997) ("Absent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.") (internal quotation marks and citations omitted); *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that in all cases involving statutory construction our starting point must be the language employed by Congress . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (internal quotation marks and citations omitted.)

The language of § 1981a(b)(1) could not be more clear: the statute provides that a plaintiff "may" recover punitive damages when the defendant has engaged in intentional discrimination "with malice *or* with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (emphasis supplied). This Court has already employed this plain language in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), rejecting the notion that egregious conduct is required for punitive damages and holding that a plaintiff may not reach the jury on punitive damages if a

defendant acted in good faith and non-recklessly. *Amici* urge this Court to adopt here the standard it set forth in *Hazen*.

The *en banc* majority opinion, by importing into § 1981a(b)(1) an "egregious conduct" requirement, violates the plain meaning of the statute, necessarily either erasing the "reckless indifference" clause or adding an "egregious conduct" clause. The basis for the *en banc* majority's refusal to follow the plain meaning of the statute is the fact that Congress placed the punitive damage remedy in § 1981a rather than coupling it directly to the liability standard set out in § 2000e-5. *Kolstad*, 139 F.3d at 961. Based solely on this fact, the *en banc* majority concludes — without citation to *any* authority — that Congress could not have meant what it wrote. This reasoning is contrived. First, the damages provisions in § 1981a apply to certain intentional violations of the Americans with Disabilities Act and to certain violations of the Rehabilitation Act of 1973, not just to Title VII, 42 U.S.C. § 1981a(a)(2), -(3). It would have been quite odd for Congress to bury the damages provisions for two other statutes in the midst of Title VII. Second, *all* of the non-equitable remedies available for violations of Title VII appear in § 1981a,[9] both those for

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[9]Back pay, front pay, and prejudgment interest are generally considered equitable monetary remedies, and have been awarded under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). The 1991 Act excludes from "compensatory damages" back pay "or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(b)(2). Front pay, as well as back pay and prejudgment interest, are therefore excluded from the "caps" on damages in the 1991 Act. *Kramer v. Logan County School District No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998); *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 947-48, 951-52 (7th Cir. 1998) (affirming award of front pay in addition to the full award of compensatory damages allowed under the caps; front pay is an equitable remedy under § 706(g)(1)); Section-by-Section Analysis of Rep. Don Edwards, the floor

(continued...)

compensatory and those for punitive damages. *See* 42 U.S.C. § 1981a(a)(1) (providing for compensatory and punitive damages), (b)(1) (providing for punitive damages), (b)(3) (defining compensatory damages). Certainly, no special significance can be attributed to this unremarkable fact, and no ambiguity in the statute can be deemed to arise from it. The *en banc* majority's view that this fact in and of itself somehow demonstrates that Congress intended a higher standard for punitive damages is untenable, and does not warrant departure from the plain meaning of the statute.

C. This Court Has Defined "Reckless Indifference" to Mean Less Than Outrageous or Egregious Conduct in Numerous Contexts, Including Interpretation of Other Anti-Discrimination Statutes.

This Court's past decisions support interpreting the Civil Rights Act of 1991 consistently with its plain meaning. As an initial matter, the *en banc* majority's departure from the plain meaning of the statute is not warranted by the fact that under it, evidence sufficient to reach the jury on liability for intentional discrimination will often be sufficient to permit the jury to award punitive damages. This Court has held, "There has never been any general common-law rule that the threshold for

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[2](...continued)
manager of the Act in the House, 137 Cong. Rec. H 9527 (daily ed., Nov. 7, 1991), referring to § 1981a as § 1977A of the Revised Statutes ("Damages awarded under section 1977A cannot include remedies already available under Title VII including back pay, the interest thereon, front pay, or any other relief authorized under Title VII."). There is no contrary legislative history. *But see Hudson v. Reno*, 130 F.3d 1193, 1202-04 (6th Cir. 1997) (front pay is legal, not equitable, and is subject to the "caps"), *cert. denied*, ___ U.S. ___, 119 S. Ct. 64 (1998).

punitive damages must always be higher than that for compensatory liability." *Smith v. Wade*, 461 U.S. 30, 53 (1983). Further,

> in situations where the standard for compensatory liability is as high or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without requiring any extra showing.

Id. Thus, Congress need not require a plaintiff seeking punitive damages in a Title VII case to show egregious or outrageous conduct, in addition to intentional discrimination.

Past decisions of this Court and Circuit Courts confirm that Congress did not intend "reckless indifference" to mean egregious conduct. "Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous." *Hazen*, 507 U.S. at 617. In some instances, this Court has employed the "reckless indifference" language used in the Act, *Smith v. Wade*, 461 U.S. at 43 n. 10, while in others, it has relied on the phrase "reckless disregard," *Hazen*, 507 U.S. at 616; *Thurston*, 469 U.S. at 126, and, in general, it has used the terms "indifference" and "disregard" interchangeably in this context. *Smith v. Wade*, 461 U.S. at 38; *Thurston*, 469 U.S. at 127. None of these cases required a finding of egregious conduct to award punitive damages.

Congress' decision to adopt the "reckless indifference" standard for punitive damages in Title VII, ADA, and Rehabilitation Act cases clearly was designed to bring the various statutes proscribing discrimination in the workplace into harmony. The plain meaning of the standard for punitive damages in Section 1981a(b)(1) is identical to that found

appropriate by this Court under the ADEA,[10] and Section 1983,[11] and by numerous Circuit Courts under Section 1981.[12] This Court has also found the same standard to be appropriate for claims in other areas of the law, including under the Fair Labor Standards Act ("FLSA")[13] and in defamation cases.[14]

Reading the 1991 Act contrary to its plain meaning, and in conflict with *Hazen*, *Thurston*, and *Smith v. Wade*, makes no logical sense. It also serves to confuse employers and employees alike as to the conduct that may give rise to punitive damages for work-place discrimination. Under the *en banc* majority's approach, the same degree of culpable conduct that would subject an employer to liability for punitive damages under Section 1981 and the ADEA would not do so under Title VII. Disharmony in the anti-discrimination statutes would

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[10] *See Hazen*, 507 U.S. 604 (1993) and *Thurston*, 469 U.S. 111 (1985).

[11] *See Smith v. Wade*, 461 U.S. 30 (1983).

[12] *See Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995); *Hicks v. Brown Group, Inc.*, 902 F. 2d 630, 654 (8th Cir. 1990); *Rowlett v. Anheuser-Bush, Inc.*, 832 F. 2d 194, 205-06 (1st Cir. 1987); *Williamson v. Handy Button Mach. Co.*, 817 F. 2d 1290, 1296 (7th Cir. 1987).

[13] *See McLaughlin v. Richland Shoe Co*, 486 U.S. 128, 133 (1988) (adopting "reckless disregard" standard from *Thurston* in interpreting when willful violation of FLSA extends its statute of limitations.)

[14] *See Gertz v. Robert Welch Inc.*, 418 U.S. 323, 348-352 (1974) (standard for punitive damages in defamation context requires showing of "knowledge of falsity or reckless disregard for the truth.").

result.[15] Moreover, the *en banc* majority's interpretation would deprive Congress of a stable vocabulary for drafting statutes. Departing from the established meaning of "reckless indifference" would confound the legislative process, upsetting Congress' natural expectation for how its words would be applied.[16] This Court in *Hazen* has already rejected an identical effort to import into the reckless indifference standard a requirement of egregious and outrageous conduct, an analysis that turns the traditional uses of these terms on their collective heads. 507 U.S. at 615-16.

Traditional understandings of "reckless indifference" support this Court's interpretation of the phrase. The *Restatement (Second) of Torts*, on which the *en banc* majority relies, observes that punitive damages are allowable for conduct that is outrageous *because of* (1) a defendant's evil motive, or (2) a defendant's reckless indifference to the rights of others. *Restatement (Second) of Torts*, § 908. According to the *Restatement*, reckless indifference is one way of showing that conduct is outrageous. *See id.* at comment b (reckless indifference may support punitive damages award). The *en banc* majority twists this notion, arguing that outrageous

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[15] For example, intentional discrimination against African-Americans could give rise to punitive damages under Section 1981, while equally culpable conduct by the same employer against women would not be subject to punitive damages under Title VII.

[16] This Court recognized the importance of interpreting Congressional language consistently with the way that language had been interpreted before Congress acted. *See Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2202 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.") (citations omitted).

conduct is necessary to show reckless indifference. The result is hopelessly circular.

To reach its result, not only must the *en banc* majority add its own language to the statute, but it must do so in the wrong place, reading its outrageous conduct standard into the provision of the statute addressing the state of the mind of the defendant. Section 1981a(b)(1) sets out two requirements permitting a jury to award punitive damages. The first requirement includes the *conduct* of the defendant: the defendant must have engaged in a discriminatory practice. The second requirement addresses the defendant's *state of mind*, or *mens rea*: the defendant must have acted with malice or reckless indifference. Malice and reckless indifference are terms traditionally used to described an actor's state of mind, not his or her conduct. The commentary in the *Restatement of Torts* states, "reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary *state of mind* to justify punitive damages." *Restatement of Torts (2d)*, § 908, comment b (emphasis added). The language of Section 1981a(b)(1) regarding "reckless indifference" does not include or incorporate any yardstick or measure of the nature of the defendant's conduct, because it does not address *conduct* at all. The First Circuit, in refusing to read the requirement of "aggravating circumstances" into the standard for awarding punitive damages under 42 U.S.C. § 1981, similarly recognized that under the Restatement conduct is outrageous because it is done with reckless indifference, and not the other way around. The court explained,

> As *Smith v. Wade* and section 908 of the *Restatement Second of Torts* make clear, misconduct is "extraordinary" (in the language of the *Smith v. Wade* "instruction") or "outrageous" (in the language of the *Restatement*) *because of the intent of the wrongdoer*. Comment b to section 908 states that conduct is outrageous "either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others."

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 206 (1st Cir. 1987) (internal citations omitted).[17] The *en banc* majority offered no other textual basis for its "egregious conduct" standards. None exists in the statute.

D. The Legislative History of the Civil Rights Act of 1991 Offers No Basis for the "Outrageous Conduct" Standard.

The legislative history of the Civil Rights Act of 1991 does not support creating a requirement of egregious conduct for plaintiffs to recover punitive damages under Title VII. The only references *amici* could find in the legislative history to egregiousness indicated that punitive damages should be

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[17] *Rowlett* is highly relevant to this decision because it considered and rejected the position later adopted by the D.C. Circuit in *Kolstad*, 832 F.2d at 205-06, and because Congress expressly relied upon it in enacting the 1991 Act, 832 F.2d at 205-06. Another case relied upon by Congress, *Beauford v. Sisters of Mercy*, 816 F.2d 1104, 1109 (6th Cir.), *cert. denied*, 484 U.S. 913 (1987), referred to "egregious conduct" as an *alternative* basis for punitive damages. These cases were cited in the Report of the Senate Committee on Labor and Human Resources, S. REP. 101-315 (101st Cong., 2d Sess.) at 55 (only cases mentioned in addition to *Smith v. Wade*); the Report of the House Committee on Education and Labor, H. REP. 102-40(I) (102nd Cong., 1st Sess.) at 74, 1991 U.S.C.C.A.A.N. 549, 612 (only cases mentioned in addition to *Smith v. Wade*).

available in "egregious cases." *E.g.*, Report of the Senate Committee on Labor and Human Resources, S. REP. 101–315 (101st Cong., 2d Sess.) at 7 (1990); Report of the House Committee on Education and Labor, H. REP. 102–40(I) (102nd Cong., 1st Sess.) at 65 (punitive damages under § 1981 available in "particularly egregious cases"), 1991 U.S.C.C.A.A.N. 549, 603 (1991); Report of the House Committee on the Judiciary, H. REP. 102–40(II) (102nd Cong., 1st Sess.) at 3, 1991 U.S.C.C.A.A.N. 694, 695–96 (1991); Interpretative Memorandum of Sen. Danforth and the other Republican co-sponsors of the Act, 137 Cong. Rec. S 15483 (daily ed., Oct. 30, 1991) (referring to the standard under § 1981); statement of Rep. Hyde, 137 Cong. Rec. H 9543 (daily ed., Nov. 7, 1991) ("extraordinarily egregious cases"); *but see* categorical rebuttal of Rep. Ford, 137 Cong. Rec. H 9549 (daily ed., Nov. 7, 1991).

This legislative history does not help the defendant. The phrase "egregious case" aptly describes an instance in which a defendant acts with malice or reckless indifference to the federally protected rights of a victim. Nothing *amici* have been able to find in the legislative history suggests that Congress was referring to the egregiousness of the defendant's *conduct*, as the lower court would have it, as compared to the egregiousness of the defendant's *state of mind*. Congress made abundantly clear, both in the language of the Act and in the legislative history, that it was relying on the standard set by the Court in *Smith v. Wade* and other cases, and that it intended that no higher standard had to be met under § 1981a than under other legislation. Report of the Senate Committee on Labor and Human Resources, S. REP. 101–315 (101st Cong., 2d Sess.) at 7 and 55 (equating the damages remedy with that available under § 1981 and citing *Smith v. Wade* and other cases); Report of the House Committee on Education and Labor, H. REP. 102–40(I) (102nd Cong., 1st Sess.) at 14-15, 65, and 70

(expressing desire for similarity of damages remedies under § 1981 and the 1991 Act) and 74 (citing *Smith v. Wade* and other cases), 1991 U.S.C.C.A.A.N. 549, 552-53, 603, 608, 612 (1991); Report of the House Committee on the Judiciary, H. REP. 102–40(II) (102nd Cong., 1st Sess.) at 24-28 (expressing desire for similarity of damages remedies under § 1981 and the 1991 Act) and 29 (citing *Smith v. Wade* and another case), 1991 U.S.C.C.A.A.N. 694, 717-22 (1991).

E. The En Banc Majority's Opinion Conflicts with this Court's Past Decisions.

The *en banc* majority also fails in its attempts to distinguish this Court's opinions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1984), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which explicitly reject in the ADEA context, the very "egregious conduct" standard created by the *en banc* majority here.

First, the *en banc* majority tries to distinguish those cases on the grounds that the ADEA requires a showing of "willfulness" on the part of the defendant for the plaintiff to recover liquidated damages. *Kolstad*, 139 F.3d at 966-67. In the ADEA cases, however, this Court held that the willfulness requirement of the ADEA can be established by a showing that "the employer knew *or showed reckless disregard* for the matter of whether its conduct was prohibited . . . ." *Hazen*, 507 U.S. at 614; *Thurston*, 469 U.S. at 126 (emphasis supplied). Thus, the *en banc* majority's distinction is one without a difference.

Second, the *en banc* majority attempts to distinguish the ADEA cases on the grounds that the ADEA does not provide for punitive damages, but rather provides for liquidated

damages that serve to double the back pay a plaintiff obtains.[18] The *en banc* panel argues that the punitive damages potentially available to a plaintiff under Title VII are somehow critically different because they are not directly tied to the actual amount of "compensatory damages" — perhaps loosely referring to back pay, or perhaps to the sum of all monetary awards. Apparently worried that a defendant who has engaged in intentional discrimination could be liable for an inappropriately large punitive damages award, the *en banc* majority contends that the difference between liquidated damages under the ADEA and punitive damages under Title VII somehow renders *Thurston* and *Hazen Paper* inapposite. However, the standard for liability for punitive damages should not be distorted to contend with concerns about inappropriately large punitive damages awards. Rather, the courts should interpret the standard for punitive damages as Congress wrote it, and rely on doctrine this Court has fashioned to deal directly with punitive damages awards that "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *See BMW v. Gore*, 517 U.S. 559 (1996).

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[18]The *en banc* majority ignores this Court's recognition in *Thurston* that "the legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature," *Thurston*, 469 U.S. at 125, and also ignores the fact that Title VII and the ADEA are to be interpreted in the same fashion because "the substantive provisions of the ADEA were derived *in haec verba* from Title VII." *Id.* at 121 (citation and quotation marks omitted).

F. The Stated Purpose of the 1991 Civil Rights Act Is to Expand Civil Rights Remedies, Not Make Them Less Accessible.

The specific findings made by Congress in enacting the Civil Rights Act of 1991, and the specific purposes of the Act enunciated by Congress therein further support the reading of Section 1981a(b)(1) urged by *amici*.

In Section 2 of the Act, Congress made specific findings that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;" and that "legislation is necessary to provide additional protections against unlawful discrimination in employment." In Section 3, Congress set forth as two of the specific purposes of the Act "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; . . . [and] to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil right statutes in order to provide adequate protection to victims of discrimination." In light of these findings, and in order to achieve its stated purposes, Congress broadened the relief available to Title VII plaintiffs by authorizing jury trials and compensatory and punitive damages, relief that was not previously available under Title VII. Indeed, as this Court has noted, the Act "effects a major expansion in the relief available to victims of employment discrimination." *Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 255 (1994). An affirmance here would dramatically narrow the circumstances under which victims of discrimination can recover punitive damages, nullifying the stated purposes of the Act.

The *en banc* majority further violates "the familiar canon of statutory construction that remedial legislation should be

construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals*, 522-32 (1960) ("remedial statutes are to be liberally construed . . . .").

Given Congress's specific findings and stated purposes with respect to expanding the relief available to victims of intentional discrimination, and in light of the canon of statutory interpretation that remedial provisions are to be read expansively, not restrictively, the standard urged by *amici* here for punitive damages under Title VII is appropriate. Any more limited reading would defeat the specifically enunciated purposes of the Act.

G. The Reckless Indifference Standard Is Sound Policy.

Few things are as odious to our constitutional polity as intentional discrimination on the basis of immutable characteristics. Such intentional discrimination engaged in by a defendant aware of the risk of unlawfulness of its conduct is particularly harmful, and warrants heightened punishment.

Use of the reckless indifference standard established by the statute and supported by amici would *not* subject to punitive damages conduct that is intentional but done in good faith and in a non-reckless belief that the conduct fell within an exception to Title VII. As this Court held in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the reckless indifference standard does not mean that punitive damages will result in every case where disparate treatment is proved. In interpreting this standard under the ADEA, this Court explained,

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a 'bona fide occupational qualification' defense, and exempts certain subject matters and persons. If an employer incorrectly but in good faith and non-recklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.

Id. at 616 (internal citations and parentheticals omitted). The same reasoning applies to imposing punitive damages under Title VII. Prior to *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), for example, an employer who excluded women capable of bearing children from positions of employment that exposed them to dangerous levels of lead, believing that such a measure fit within the bona fide occupational exception to Title VII, likely would not be subject to punitive damages. *See* Section 703(e)(1) (allowing discrimination under Title VII on the basis of "religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"). A good faith effort to abide by Title VII does not reflect the reckless indifference necessary for an award of punitive damages. This position is in no way inconsistent with this Court's conclusion in *Hazen*: "Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision." *Hazen*, 507 U.S. at 617.

Moreover, in no event is the jury *required* to award punitive damages. Section 1981a(b)(1) states that a plaintiff "may" recover punitive damages, not that the plaintiff is entitled to punitive damages, where a defendant intentionally discriminates with "reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). To impose punitive damages, a jury must reach two conclusions, first that the defendant acted with either malice or reckless indifference and, second, that punitive damages are appropriate. *See Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 206 (1st Cir. 1987) ("In *Smith v. Wade*, the [Supreme] Court discusses the finding of recklessness, *i.e.*, the requisite level of *intent*, as a 'threshold' beyond which the jury may in its 'discretionary moral judgment' award punitive damages.") (emphasis in original) (citing *Smith v. Wade*, 461 U.S. 30, 52 (1983)).

By making punitive damages available in Title VII cases, Congress chose to establish an additional means for punishing defendants who have engaged in intentional discrimination with malice *or* with reckless indifference to the rights of their victims. In the view of *amici*, this additional punishment reflects the well-settled principle that our anti-discrimination statutes are of the "highest priority" and that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment due to discrimination. . . ." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). Title VII has two distinct, but related, central statutory purposes: (1) eradicating discrimination throughout the economy, and (2) making persons whole for injuries suffered through past discrimination. *Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 254 (1993). Just as adding compensatory damages to back pay serves both statutory purposes, the addition of punitive damages to other monetary relief serves the deterrent function. Each

remedy is "part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power in light of the large objectives of the Act." *Albemarle Paper Co. et. al. v. Moody, et. al.*, 422 U.S. 405, 416 (1975).

Congress has exercised its prerogative to further one of the central purposes of Title VII — deterrence of all forms of discrimination throughout the economy — by carefully crafting a rule that reserves greater punishment for intentional discrimination undertaken with malice or with reckless indifference, while still protecting defendants, while they are guilty of such discrimination, acted without malice and without reckless indifference for the rights of individuals.

The rule adopted by the *en banc* majority upsets this careful balance by limiting punitive damages to only the most "outrageous" and "egregious" conduct. Had that been Congress' intent, it certainly could have so provided. Instead, Congress chose language with a plain meaning, familiar to Congress and the courts from this Court's own jurisprudence. As Justice O'Connor has explained, the Court's "task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider [the] particular cases. Rather, it is to determine whether the language the legislators actually enacted has a plain, unambiguous meaning. In this instance, we believe it does." *Beecham v. U.S.*, 511 U.S. 368, 374 (1994).

There is no basis in the plain language of the statute, nor in the legislative history, nor in this Court's jurisprudence, for the *en banc* majority's view that plaintiffs should not be able to obtain punitive damages under Title VII unless they can show malice or outrageous conduct. As this Court held in *Smith*, there is "no reason why a person whose federally guaranteed

rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." *Smith*, 461 U.S. at 48-49. As this Court explained in *Smith*, punitive damages traditionally have been, and are, available to plaintiffs in a variety of contexts under tort law upon a showing of conduct that does not rise to the level of "outrageous" or "egregious" conduct. *Smith*, 461 U.S. at 38-49 (exhaustively tracing the history of punitive damages law). There is no principled basis for requiring a higher showing by a victim of intentional discrimination.

IV. CONCLUSION.

Nothing in the plain meaning of Section 1981a(b)(1) supports the *en banc* majority's wholesale creation of an egregious conduct standard for imposition of punitive damages under Title VII. Rather, as set forth unambiguously in the statute, punitive damages should be available to plaintiffs who have established that a defendant has intentionally discriminated, unless it has acted without malice or reckless indifference, the standard this Court has already adopted in *Hazen* and its predecessors. No higher standard should be adopted here.

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Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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For the District of Columbia Circuit

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association whose 50,000 members primarily represent persons seeking to vindicate their legal rights in personal injury tort actions, civil rights and employment discrimination cases, and commercial litigation.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than

SUMMARY OF THE ARGUMENT

This case involves an interpretation of 42 U.S.C. §1981a by the court of appeals below that is at odds with the plain text of the statute and undermines the purpose of Congress in enacting this provision.

The decision below prevents the jury in cases of intentional discrimination in employment from considering the appropriateness of punitive damages in all but those cases in which the judge has deemed defendant's conduct to be sufficiently "egregious." The court ruled that, as a matter of law, punitive damages were not available in "typical" or "garden-variety" cases of intentional discrimination.

The plain text of the statute makes the defendant's mental state -- malice or reckless disregard for federally protected rights -- the essential prerequisite for punitive damages. Congress did not provide that such damages were recoverable only where the conduct was also egregious.

Limiting the remedy of punitive damages to the uncommon case of egregious misconduct undermines the statutory objective of ridding the workplace of bigotry. The punitive damage remedy is expecially important in combatting discrimination in promotion decisions and other situations where compensatory damages may not be great enough to deter future misconduct.

To accomplish the goal of the civil rights statutes, punitive damages should be available in cases where the defendant knew or should have known that its conduct was

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amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief. Letters of consent by the parties to the filing of this brief have been filed with this Court.

unlawful. This standard is familiar to courts and is applied routinely.

Even if the statutory text could support the lower court's additional requirement of a judicial determination of egregious conduct as a prerequisite to punitive damages, such an interpretation intrudes on the constitutionally protected role of the jury.

Jury discretion and expression of community values have characterized punitive damages from their common law inception. Moreover, the history of the Seventh Amendment emphasizes the importance of preserving the jury's role against encroachment by judges. In interpreting §1981a with respect to the relationship between judge and jury, this Court should preserve the constitutionally protected role of the jury.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE PURPOSE OF §1981a BY PREVENTING JURY CONSIDERATION OF PUNITIVE DAMAGES WHERE THE JUDGE HAS DETERMINED THAT THE CONDUCT WAS NOT SUFFICIENTLY "EGREGIOUS."

Petitioner Carole Kolstad alleged that her employer, Respondent American Dental Association, failed to promote her because of her gender, in violation of the Civil Rights Act of 1964, Title VII, as amended. The jury resolved the issue of liability in Kolstad's favor, awarding compensatory damages. However, the district court refused to instruct the jury on the issue of punitive damages.

The Court of Appeals, *en banc*, addressed the single question "whether the standard of evidence for punitive damages under Title VII is, in all but a narrow range of cases, no higher than the standard of liability." 139 F.3d at 960. Having thus framed the issue, the court held that "punitive

damages in a Title VII case may be imposed only on a showing of egregious conduct." *Id.*

In the course of its opinion, the court repeated its view that punitive damages should not be available "in the standard case of intentional discrimination under Title VII," *id.*; "in the typical run of Title VII cases," id. at 962; or in "every garden-variety disparate treatment case" id at 968, even where the jury in such cases might find that the defendant acted "with malice or with reckless indifference" to plaintiff's federally protected rights. Instead, the court ruled that the jury may make its determination only in those relatively infrequent instances where, in the estimation of the judge, the defendant has displayed sufficiently "egregious" or "truly outrageous acts of discrimination." *Id.* at 969 n.9.

This artificial threshold, which has no support in the text of statute and which would limit the remedy of punitive damages to a relatively small number of unusual cases of intentional discrimination, severely undermines the policies and purposes of §1981a. In addition, as Amicus discusses in Part II, *infra*, allocating to the trial judge the determination of whether a defendant's conduct merits punitive damages intrudes on the constitutionally protected role of the jury.

A. The Purpose of Section 1981a Is to Punish and Deter Employers Who Engage In Intentional Discrimination With Malice or Reckless Disregard of Federally Protected Rights, Regardless of Whether the Conduct Is Egregious.

The relevant portion of 42 U.S.C. §1981a provides:

> **(a) Right of Recovery**
>
> **(1) Civil Rights**
>
> In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5), . . . the complaining party may recover compensatory and punitive damages as allowed under subsection (b) of this section . . .

> **(b) Compensatory and Punitive Damages**
>
> **(1) Determination of punitive damages**
>
> A complaining party may recover punitive damages under this section . . . if the complaining party demonstrates that the respondent engaged in discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

The plain text of §1981a(b)(1) focuses the jury's attention on defendant's mental state as the prerequisite for an award of punitive damages. In short, Congress selected the powerful weapon of punitive damages to punish and deter bigotry in the workplace.

The lower court recognized that "malice" and "reckless indifference" are mental states, but stated that these terms are too "malleable and ambiguous" to serve as the basis for the jury's imposition of punitive damages. 139 F.3d at 962. The court gave little weight to this Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983), from which Congress selected this language. Explicitly rejecting arguments that these terms are too vague, this Court held:

> [A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.

Id. at 56.

The court of appeals in this case, however, held that punitive damages may be imposed only where the defendant's *conduct* is also "egregious." Egregious conduct, by definition, is unusual or uncommon. The court declined "to define this requirement with specificity." 139 F.3d at 965. One judge may look to whether the discriminatory conduct affected a significant number of employees. For another, a repeated pattern of discriminatory conduct would qualify. Yet another

may look for especially odious comments accompanying the discrimination. What the court of appeals made clear, however, is that, as a matter of law, juries may not consider punitive damages in "typical" or "garden-variety" instances of intentional discrimination.

Congress could have limited the availability of punitive damages to those exceptional cases involving not only the prohibited mental state but also egregious misconduct. That Congress did not indicates the legislators' recognition that, unhappily, instances of bigotry within the employment context are all too common and should be the subject of punitive damages wherever they occur. By limiting this remedy to relatively uncommon instances of egregious misconduct, the lower court undermines and contradicts Congress's purpose.

B. The Plain Text Of §1981a Makes The Mental State Of The Defendant, Not The Egregious Nature Of The Conduct, The Basis For Punitive Damages.

The statutory text makes clear that the employer's awareness of its wrongful conduct is the gravamen of a punitive damages award. Where "the intent of Congress is clear, that is the end of the matter for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The court of appeals stated that its decision "aligns us with all but one of the several circuit courts to address this question." 139 F.3d at 968. However, the court failed to recognize that even among those circuits applying a "heightened" standard for recovery of punitive damages, the courts focused on the defendant's intent, not conduct. For example, adopting a heightened standard for punitive damages, the court in *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299 (9th Cir. 1998), nevertheless emphasized that it was not "egregious conduct," but a mental state that was the prerequisite for a finding of punitive damages.

> Under the heightened standard adopted in these cases, intentional acts of discrimination giving rise to section 1981 liability do not warrant punitive damages unless they evince "malice or reckless or callous indifference of an egregious character," *Beauford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 1104, 1109 (6th Cir. 1987), or a comparably reprehensible intent.

Id. at 1302-03. The Ninth Circuit adopted the "almost certainly knew" standard employed by the Seventh Circuit.

> Thus, to be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant "almost certainly knew that what he was doing was wrongful and subject to punishment." *Soderbeck v. Burnett County*, 752 F.2d 285, 291 (7th Cir. 1985).

Id. at 1304.

In *EEOC v. Wal Mart Stores*, 156 F.3d 989 (9th Cir. 1998), the Ninth Circuit applied that same standard to reverse a district court's refusal of a punitive damages instruction. The jury there returned a verdict in favor of appellant EEOC, finding that the defendant had intentionally discriminated against a job applicant based on her pregnancy, in violation of Title VII. The district court refused the EEOC's request for an instruction to the jury on the issue of punitive damages, ruling that a heightened standard is required. *Id.* at 991.

In reversing the district court, the Ninth Circuit acknowledged its recent ruling in *Ngo v. Reno Hilton Resort Corp.*, *supra*, that "to be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant 'almost certainly knew that what he was doing was wrongful and subject to punishment.'" *Id.* at 992. The court ruled that even this so-called heightened standard was satisfied by evidence that "Wal-Mart's decision-makers deliberately rejected [the employee] because of her pregnancy and conspired to cover up their unlawful discrimination by fabricating an interview that never took place." *Id.* The Ninth Circuit distinguished *Ngo* on the basis that there existed more

than "negligent decision making" and "poor communications among managers." *Id.* The EEOC's evidence of discriminatory intent was sufficient to support an instruction on the subject of punitive damages. Under these circumstances, the defendant "almost certainly knew that [its] conduct was wrongful." *Id.*

Other circuits have found that evidence, direct or circumstantial, that the defendant was motivated by bigotry should always suffice to meet this test, even in "garden-variety" disparate treatment cases. *Harris v. L & L Wings Inc.*, 132 F.3d 978, 982 (4th Cir. 1997)(affirming a punitive damages award based on evidence of reckless indifference to federally protected rights where the employer completely failed to address repeated complaints of pervasive sexual harassment); *Luciano v. Olsten Corp.*, 110 F.3d 210, 220-22 (2d Cir. 1997)(affirming a punitive damages award where the employer drew up an impossible job description for a female employee designed to ensure that her performance would be unsatisfactory, and then terminated her); *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 582 (7th Cir. 1996) (affirming an award of punitive damages where the defendant had terminated the plaintiff's employment for refusing to withdraw her discrimination claim, and gave false reasons for terminating her); *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 637 (7th Cir. 1996)(affirming a punitive damages award based on evidence of at least reckless indifference where the owner of the defendant corporation and other high-level executives had a stated policy against women holding positions in upper-level management); *Yarborough v. Tower Oldsmobile, Inc.*, 789 F.2d 508, 514 (7th Cir. 1986)(affirming a punitive damages award where the defendant's "ill will against the plaintiff, or callous indifference to his federally protected rights" was evidenced by the defendant's failure to respond to complaints by the African-American plaintiff that he was assigned by a manager to an

inferior work area, to do less lucrative work, based on his race).

C. The Punitive Damage Remedy Is Especially Important to Further the Goals of §1981a in "Garden-Variety" Employment Discrimination Cases.

Congress selected the remedy of punitive damages to advance the primary purpose of Title VII: To eliminate discrimination by deterring future illegal employment practices. *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995)("The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'. . . Deterrence is one object of these statutes."); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982)("The 'primary objective' of Title VII is to bring employment discrimination to an end.").

Deterrence is undeniably the purpose of punitive damages. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). This Court has recognized that this remedy is of particular importance in the context of deprivations of civil rights, where compensatory damages alone cannot be counted on to deter misconduct. As the Court pointed out in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-70 (1981), by "allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute [42 U.S.C. § 1983] directly advances the public's interest in preventing repeated constitutional deprivations." In *Carlson v. Green*, 446 U.S. 14 (1980), the Court further explained that "punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury." *Id.* at 22. n.9.

Punitive damages serve a similar purpose in furthering the congressional objective of eliminating employment

discrimination. In a substantial number of cases where the defendant knew it was violating the law, the combination of compensatory damages and injunctive relief is insufficient to deter illegal discrimination.

This Court has previously considered the standard to be applied on the issue of whether to award simple backpay under Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Much of the Court's analysis in that case with reference to backpay has even greater applicability to an award of punitive damages.

In *Albemarle Paper*, a class of African Americans brought suit requesting injunctive relief, and ultimately back pay, in a claim of racial discrimination under Title VII of the 1964 Civil Rights Act as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e et seq. (1970 ed. and Supp. III). The district court found that "the petitioners had 'strictly segregated' the plant's departmental 'lines of progression' prior to January 1, 1964, reserving the higher paying and more skilled lines for whites." A subsequent reorganization of the plant left African American employees "locked in the lower paying job classifications." Accordingly, the district court ordered the petitioners to implement a system of plant wide seniority. 422 U.S. at 409. The court refused, however, to award backpay to the plaintiff class for losses suffered under the "job seniority" program on the grounds that "there was no evidence of bad faith noncompliance with the Act." *Id.* at 410. The court of appeals reversed, ruling that the absence of bad faith was not a basis for denying backpay. *Id.* at 412.

In its review, this Court acknowledged that backpay was not an automatic or mandatory remedy, and that in the first instance these choices are left to district courts. *Id.* at 415. In determining the standards to be applied for backpay awards, courts must be guided "in light of the large objectives of the Act." *Id.* at 416. The Court acknowledged that the primary objective of Title VII was a prophylactic one: "to achieve

equality of employment opportunities and remove barriers [of race discrimination]." *Id.* at 417 (citing *Griggs v. Duke Power Co.*, 401 U.S. at 429-430).

The Court in *Albemarle* acknowledged that the prospect of an injunctive order was insufficient to deter illegal discrimination, and the back pay provision was designed, at least in part, to have this deterrent effect.

> Backpay *has an obvious connection with this purpose*. If employers faced only the prospect of an injunctive order, *they would have little incentive to shun practices of dubious legality*. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States v. N. L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973).

Id. at 417-418 (emphasis added). The Court ruled that back pay should be denied only where it would not frustrate the "twin statutory objectives" of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

> It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and rcumstances peculiar to particular cases.

Id. at 421-422. Applying this standard, the Court ruled that the lack of bad faith was an insufficient reason for denying back pay. *Id.* at 422.

Similarly, Amicus suggests, in many cases, the prospect of an injunctive order and compensatory damages creates "little incentive to shun practices of dubious legality." Punitive damages "has an obvious connection with this purpose."

The measure of backpay damages in failure to promote cases is the difference between the amount that the plaintiff actually earned and the amount that he/she would have earned in the position denied but for the illegal discrimination. Typically, the damages in failure-to-promote cases often are minimal. An openly discriminating employer might well conclude that an award of backpay was well worth the price to exclude a protected minority from a key position in management. Only the prospect of punitive damages could effectively deter this illegal conduct.

Many employment positions occupied by either ethnic minorities or women pay less than $10 per hour. Upon being illegally terminated from any employment, employees are required to mitigate damages by exercising reasonable diligence to find a substantially similar job to the one that was lost. *See Ford Motor Co. v. EEOC*, 485 U.S. 219, 231 (1982)(mitigation "requires the claimant to use reasonable diligence in finding other suitable employment"); *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978)(the defendant must establish that (1) plaintiff failed to exercise reasonable diligence *and* (2) there were substantially similar positions available for which plaintiff could have applied)(emphasis added); *Cassino v. Reichhold Chemical*, 817 F.2d 1338, 1345 (9th Cir. 1987)(similar).

Often such employees are successful in finding an alternative job in a relatively short period of time; two to three weeks. While an award of $1000 back pay might make the plaintiff whole, it would have no deterrent effect on future

discriminatory practices. Quite to the contrary, a racist or sexist employer might conclude that $1000 is well worth the price of discrimination.2

Thus, in many ordinary cases, only nominal damages are recoverable. In such cases, punitive damages represent the only deterrent impact that §1981a can exert. *E.g., Hennessy v. Penril Datacommm Networks, Inc.*, 69 F.3d 1344, 1352 (7th Cir. 1995)("the jury's consideration of the issue of punitive damages was appropriate, even though it did not award compensatory damages"); *Larez v. City of Los Angeles*, 946 F.2d 630, 639 (9th Cir. 1991)(nominal and punitive damages upheld in claim under Section 1983); Ninth Circuit Model Instruction 7.05. Without the potential for punitive damages, there exists not even the pretense of deterrence in those cases where only nominal damages are recovered.

Under the egregious conduct standard applied by the court of appeals, even an employer who openly admitted illegal discrimination would not be subject to an award of punitive damages. 139 F.3d at 961 ("the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination"). Where compensatory damages are minimal or nominal, this type of bigotry would be undeterred. Yet this is exactly the type of discriminatory conduct that the statute was designed to deter.

D. To Fulfill The Statutory Purpose Of Title VII, Punitive Damages Must Be Recoverable In Cases Where An Employer Knew Or Should Have Known That Its Conduct Was Illegal.

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2 Damages for emotional distress would generally add little to the plaintiff's recovery where the length of unemployment is short, and plaintiff received no psychological counseling.

The statutory purpose of Title VII will be undermined unless punitive damages are available when an employer knew or should have known that its conduct was illegal. Applying this standard, the requisite mental state will exist in "garden-variety disparate treatment cases."[3]

Within the context of qualified immunity pursuant to 42 U.S.C. Section 1983, this is a familiar standard applied daily by federal courts.

Reduced to its most basic terms, qualified immunity shields officials from liability for civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In making the qualified immunity determination, the initial question is whether the constitutional right at issue was clearly established at the time of the alleged violation. *Davis v. Scherer*, 468 U.S. 183, 197 (1984). The issue of whether the law was clearly established is a question of law for the court, and not for the jury. *Elder v. Holloway*, 510 U.S. 510, 516 (1994); *Davis v. Scherer*, *supra*, at 191-92. An official is only liable if the contours of the right he is alleged to have violated are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The specific action in question need not previously have been held unlawful, but the unlawfulness must be apparent in light of preexisting law. *Id.*4

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3 There exist numerous instances, however, when a finding of liability under Title VII will be insufficient to sustain a finding of punitive damages. In this sense, a finding of liability under Title VII does not automatically or invariably result in a potential award of punitive damages.

4 See also, *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement is never explicitly been held to apply to a search conducted in identical circumstances."); *Germany v. Vance*, 868 F.2d 916 (1st Cir. 1989)(It is not necessary for plaintiff to cite cases in which specific conduct complained of was found to be unconstitutional); *Eastwood v. Department of Corrections*, 846 F.2d 627, 630 (10th cir. 1988) (No strict factual correspondence between cases is necessary, "it is incumbent upon officials 'to relate established law to analogous factual setting.'"); *Brady v. Bebbie*, 859 F.2d 1543, 1557 (9th Cir. 1988)("Specific binding precedent is not required to show that a right is clearly established.").

While there are limits to the qualified immunity analogy, this is essentially the suggested standard for punitive damages. Simply treating an employee differently on the basis of sex or race might be insufficient to support a claim for punitive damages where, for example, a bona fide occupational qualification was asserted as a basis for different treatment. Section 703(e)(1) of Title VII permits an employer to discriminate on the basis "of religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. §2000e-2(e)(1). The scope of this exception is frequently a matter of dispute. *E.g., Automobile Workers v. Johnson Controls*, 499 U.S. 187 (1991)(Johnson Controls' fetal-protection policy does not fall within the so-called safety exception to the BFOQ). The "garden-variety" case motivated by bigotry, however, would support an award for punitive damages because the employer knows or should know that such invidious employment discrimination is against the law.

II. THE LOWER COURT'S REQUIREMENT OF A JUDICIAL DETERMINATION OF EGREGIOUSNESS AS A PRECONDITION TO SUBMITTING PUNITIVE DAMAGES TO THE JURY INTRUDES UPON THE CONSTITUTIONALLY PROTECTED ROLE OF THE JURY.

Even if the text of §1981a supported imposing a requirement that the judge find defendant's conduct sufficiently egregious as a precondition to allowing the jury to consider the appropriateness of punitive damages, amicus urges this Court to reject that construction.

In fact, the court of appeals recognized that the two-tier structure of the statutory text could easily be accommodated by allowing the jury to do its job. The court acknowledged that this Court's decision in *Smith v. Wade*, 461 U.S. 30 (1983), suggests "that the determination of that threshold in individual cases has been entrusted by *Smith* -- and hence derivatively by §1981a(b)(1) as well -- to the jury's 'discretionary moral judgment.' *Smith*, 461 U.S. at 52." 139 F.3d at 965. The lower court, however, rejected this reading as upsetting "the traditional relationship between court and jury." *Id.*

Amicus submits that deference to the role of the jury as both factfinder and conscience of the community *is* precisely the traditional relationship between judge and jury. Nowhere is this more true than in the assessment of punitive damages. Amicus further submits that the lower court's allocation of this responsibility to the judge not only upsets the traditional judge-jury relationship, but invades the province of the jury protected by the Seventh Amendment.

Even in cases involving the ultimate penalty of capital punishment, this Court has repeatedly upheld the role of the jury as "conscience of the community." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). "It is the jury's function," the Court has stated, "to make the difficult and uniquely human judgments that defy codification and that 'build discretion, equity and flexibility into a legal system.'" *McKlesky v. Kemp*, 481 U.S. 279, 331 (1987). Amicus suggests that juries perform the same function of expressing community values in determining whether, and to what extent, discriminatory conduct deserves punitive damages.

From its very inception, the remedy of punitive damages has been based on the broad discretion of the civil jury for which judges may not substitute their own views. *See Browning-Ferris Indus. v. Kelco Disposal Inc.*, 492 U.S. 257, 274-75 (1989). This role of the jury in awarding punitive damages in tort actions is generally traced to the lawsuits brought by John Wilkes and his printer against agents of the Crown who conducted an illegal search. *Id.* at n.20. There Lord Chief Justice Camden declared:

> [A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Wilkes v. Wood, Lofft. 1, 18-19, 98 Eng.Rep. 489, 498-499 (K.B.1763). *See* Linda Schlueter & Kenneth Redden, Punitive Damages 6-9 (2d ed. 1989)("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition.")

At the same time the colonists cheered the jury verdict in the Wilkes case, they complained bitterly at the erosion of their own jury rights. Specifically, they complained of England's efforts to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to non-jury tribunals administered by judges beholden to the Crown. Roscoe Pound, The Development of Constitutional Guarantees of Liberty 69-72 (1957); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973). The colonists registered their grievance in the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence ("For depriving us in many cases, of the benefits of Trial by Jury"). Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993).

When the proposed Constitution failed to include an express guarantee of the right in civil actions, the Antifederalists argued that this omission was sufficient cause to reject the entire Constitution. Even well-intentioned judges can pose a danger to the rights of common people, the Antifederalists asserted, citing Blackstone, who cautioned that judges will frequently have a bias toward those of their own rank. Landsman, *supra*, at 600. The demand for an explicit guarantee of the right to trial by jury led to the adoption of a Bill of Rights as a condition to ratification of the constitution itself. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 295-98 (1966); Wolfram, *supra*, at 667-730 (extensive review of ratification debates).

The Seventh Amendment stands as a limitation specifically directed at the power of the federal judge. Morris S. Arnold, *A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829, 832-35 (1980). *See also Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 83 (1989) (White J. dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge.") Moreover, the framers clearly expected that "the jury would reach a result that the judge either could not or would not reach." Wolfram, *supra*, at 671; Paul B. Weiss, *Reforming Tort Reform: Is there Substance to the Seventh Amendment*, 38 Catholic U. L. Rev. 737, 747 (1989). Historical evidence indicates that the Seventh Amendment was also motivated in part by the intent to preserve the jury's power, exemplified by the *Wilkes* case, to award relatively large punitive damage awards. *See* Alan Howard Scheiner *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-59 (1991).

The common-law remedy of punitive damages to be imposed within the discretion of the jury was widely adopted by American courts. By 1851, this Court recognized that punitive damages were "a well established principle of the

common law" in which it "has always been left to the jury, as the degree of punishment to be inflicted must depend on the peculiar circumstances of the case." *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). The Court later noted: "The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages is attested by the long continuance of the practice." *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 521 (1885).

This has been the "traditional relationship between court and jury" with respect to punitive damages. Amicus submits that the lower court's attempt to restrict the jury's exercise of discretion to only "egregious" cases is inconsistent with that relationship.

Mindful of this history, the Supreme Court has consistently emphasized the fundamental nature of the right to jury trials and has viewed any curtailment with great disfavor.

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990).

This Court has continued to preserve the constitutional role of the jury against encroachments by federal judges. For example, in *Hetzel v. Prince William County*, ___ U.S. ___, 118 S. Ct. 1210 (1998), a discrimination case under Title VII and §1983, the Court held that, even where the court determined that the amount of damages was grossly excessive, the Seventh Amendment prohibits the court from substituting its own assessment of the appropriate damages, and requires that the party be given the option of a new trial.

In *Feltner v. Columbia Pictures Television*, ___ U.S. ___, 118 S. Ct. 1279, 1287 (1998), the Court again emphasized that the "right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any, awarded to the copyright owner." *Id.* at 1297, citing, among other authorities, *Wilkes v. Wood, supra*.

It is true that this Court has expressed concern that wholly unfettered jury discretion may result in excessively high punitive damage awards. *Haslip*, *supra* at 18-19. Amicus suggests that the attacks on jury awards have been greatly exaggerated. *See, e.g.*, Stephen Daniels and Joanne. Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 43 (1990). Nevertheless, Congress addressed those concerns by providing a calibrated limit on the amounts of damage awards. 42 U.S.C. §1981a(b)(b). Congress thereby removed this purported justification for restricting the availability of punitive damages under the statute.

For that reason, Justice Blackmun advised, "uncertainty in the historical record should lead us . . . to give the constitutional right to a jury trial the benefit of the doubt." *Granfinaniera, S.A. v. Nordberg*, 492 U.S. 33, 92 (Blackmun, J, dissenting). "If, in the rare case, a tie-breaker is needed," Justice Brennan once counseled, "let us break the tie in favor of jury trial." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 580 (1990)(Brennan, J., concurring).

CONCLUSION

For the foregoing reasons, Amicus Curiae urges this Court to reverse the decision of the Court of Appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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STATEMENT[1]

The Chamber of Commerce of the United States of America (the "Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the world's largest federation of business, trade and professional organizations in the United States. The Chamber represents the interests of over 160,000 corporations, partnerships and proprietorships, as well as several thousand state and local chambers of commerce and professional associations. The Chamber has members of every size, in every sector and in every region of the United States. The Chamber also regularly represents the interests of these members in cases addressing issues of concern to the American business community, and has participated as *amicus curiae* in numerous cases before this court, including, from this past Term, *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and nearly every constitutional punitive damages case in recent years.

The proper interpretation and application of employment discrimination laws and the remedies for which they provide is of crucial importance to the businesses represented by the Chamber. Chamber members employ millions of workers protected by these laws. Many members have, with the encouragement and support of the Chamber, designed and implemented antidiscrimination policies and grievance procedures in order to prevent discrimination in the workplace. These policies and procedures are frequently adjusted in response to this Court's interpretation of those laws.

Before this Court, the petitioner Carole Kolstad argues that punitive damages should be available against employers any time

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[1] Counsel for both parties have consented to the filing of this brief, and the Chamber of Commerce has filed those consents with the Clerk of Court. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than the Chamber of Commerce, or its members, has made a monetary contribution to this brief's preparation or submission.

that an employer either knew or reasonably should have known that intentional discrimination is probably unlawful. If adopted, this standard would subject employers to punitive damages virtually every time an employee engages in intentional discrimination against another, whether or not the common law standards for imposing punitive damages have been satisfied, and whether or not the employer is complicit in such wrongdoing. The Chamber believes that petitioner's interpretation is inconsistent with the common law standard incorporated in the statute. The court of appeals' interpretation, allowing punitive damages only for egregious misconduct, is consistent with the common law, and would encourage employers to adopt and enforce grievance procedures and antiharassment policies that educate employees on their obligations under federal law. Because of the importance of these matters to its members and to the nation as a whole, the Chamber has a vital interest in this case.

INTRODUCTION AND SUMMARY

Unfortunately the petitioner and her supporting *amici*, like the court below, virtually ignore what the Chamber believes are the central issues. These issues are three: (1) whether, in enacting Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, Congress intended to alter the common law rules for awarding punitive damages; (2) whether those common law rules required proof of egregious misconduct or some other particularly culpable action; and (3) whether, under the common law, employers were automatically liable for punitive damages for the conduct of their employees.

In enacting Section 102, Congress used terminology from the common law. It authorized an award of "punitive damages" and provided that such an award would be permissible where an employer engaged in intentional discrimination "with malice or with reckless indifference," 42 U.S.C. § 1981a(b)(1), again using terminology well-known to the common law of punitive damages. *See, e.g., Smith v. Wade*, 461 U.S. 30, 51 (1983) (describing this as the common law standard). There is no suggestion in the statutory language or in the legislative history that Congress intended to

depart from the common law standard, nor even any argument in the opposing briefs (save a conclusory footnote in the Equal Employment Opportunity Commission's brief) that Congress intended to depart from the common law standard.

This Court in *Molzof v. United States*, 502 U.S. 301 (1992), specifically held that at common law punitive damages were designed as "punishment for egregious conduct." 502 U.S. at 305-06. That decision, which is all but ignored in the opposing briefs, is supported by numerous other authorities, including the Restatement of Torts, and other decisions of this Court. *See, e.g., Smith v. Wade*, 461 U.S. at 49, 54; Restatement (Second) of Torts § 908(1) (1979).

The use of a malice-or-recklessness standard also shows an intent to follow common law standards. As this Court has recognized, malice or reckless disregard is the general common law standard. *See Smith v. Wade*, 461 U.S. at 51. The parties appear to agree that proof of "malice" requires proof of an intent to inflict serious injury. As this Court's decision in *Smith v. Wade* makes clear, in the area of punitive damages, reckless indifference refers to a mental state that is morally equivalent to malice. *See* 461 U.S. at 40 n.10. Petitioner's own authorities acknowledge that in the tort context, recklessness refers to a disregard for the risk of harmful consequences, not mere potential illegality. *See, e.g.*, Restatement (Second) of Torts § 500, at 588; W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* § 34, at 213 (5th ed. 1984).

Finally, contrary to petitioner's implicit suggestion, the culpability of an employee engaging in egregious misconduct is not automatically imputed to the employer. At common law and under this Court's recent decisions in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, and *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, compensatory damages were automatically awardable against an employer for an employee's intentional discrimination in most circumstances, subject to certain affirmative defenses. But a different situation prevailed with respect to punitive damages. At common law, in order to avoid punishing innocent parties, courts would not impute an employee's culpability and liability for

punitive damages to the employer unless the employer was somehow implicated in its employee's misconduct or the employee was a high level manager acting within the scope of employment. The policies of Title VII themselves suggest that punitive damages should not be assessed against an employer acting in good faith, as manifested by the employer's adoption and implementation of antidiscrimination policies.

ARGUMENT

Although punitive damages are a creature of the common law, neither petitioner nor any of the *amici* in support of petitioner discuss the common law background of Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, at any length. However, as this Court has repeatedly stressed, when a statutory provision such as Section 102 employs common law terms, that provision must be read as incorporating common law principles absent clear statutory language or legislative history to the contrary. There is no such language or legislative history here, and petitioner's interpretation of the statute is completely inconsistent with the common law.

I. THE CIVIL RIGHTS ACT OF 1991 MUST BE INTERPRETED IN LIGHT OF THE COMMON LAW

A. The Background of the Civil Rights Act of 1991

In enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, Congress sought "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (citations omitted). The Act therefore makes it an "unlawful employment practice" to hire, fire, promote, compensate, or impose terms and conditions of employment "because of [an] individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a). By its terms, the Act only applies to employers who regularly employ fifteen or more individuals, *id.* § 2000e(b), and the lower courts have consistently held that individual employees are not personally liable for violations of Title VII. *See, e.g., Gary v. Long*,

59 F.3d 1391, 1399 (D.C. Cir. 1995).[2] Instead, employers are vicariously liable for compensatory damages for discriminatory conduct by their employees, subject to certain affirmative defenses. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292-93 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998).

In Title VII, Congress selected "[c]ooperation and voluntary compliance . . . as the preferred means for achieving" the statute's goal of eliminating discrimination in employment. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 44. In providing remedies where voluntary compliance has failed, Congress initially did not adopt the common law model. Instead, it chose to model the remedies under Title VII on the National Labor Relations Act, 29 U.S.C. § 151 *et seq. See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11 (1975). While Title VII, as originally enacted, permitted private suits upon exhaustion of administrative remedies, it only authorized equitable relief. Once a court found an unlawful employment practice, it was authorized to enjoin the practice and "order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring employees, with or without back pay." 42 U.S.C. § 2000e-5(g); *see also* 29 U.S.C. § 160(c) (authorizing the National Labor Relations Board to provide similar remedies).

Although these equitable remedies were intended to "mak[e] persons whole for injuries suffered through past discrimination," *Albemarle Paper Co.*, 422 U.S. at 421, they were nonetheless "circumscribed," at least in comparison with the remedies traditionally available in common law suits. *United States v. Burke*, 504 U.S. 229, 240 (1992). For example, the equitable remedies authorized by Title VII did not permit Title VII plaintiffs to obtain relief for "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other

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[2] *Accord Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (per curiam).

consequential damages." *Id.* at 239. In addition, because the primary monetary remedy under Title VII was back pay, the statute did not permit victims of harassment and other discrimination to obtain significant compensatory relief unless they were subject to a concrete job action affecting their pay. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 252-44 (1994).[3] Punitive damages were not available. *Id.* Accordingly, in the Civil Rights Act of 1991, Congress enacted a "major expansion in the relief available to victims of employment discrimination." *Id.* at 255.

Section 102 of the Act extends to Title VII plaintiffs those remedies traditionally available at common law. Subsection (a) states that the complaining party in a Title VII action brought against an employer that "engaged in unlawful intentional discrimination" may "recover compensatory and punitive damages as allowed in subsection (b) of this section," in addition to any equitable relief previously authorized under Title VII. 42 U.S.C. § 1981a(a)(1); *see also id.* § 1981a(a)(2) (authorizing similar relief in disability discrimination cases). Subsection (b) discusses the availability of punitive damages:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, governmental agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id. § 1981a(b)(1).

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[3] *See also Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989) (damages unavailable to redress violations not leading to discharge); *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 535 (5th Cir. 1986) (vacating relief for attorneys' fees).

B. The Punitive Damages Provision in Section 102 Must Be Interpreted in Light of the Common Law

In interpreting statutes such as Title VII, courts do not presume that Congress wrote on a blank slate. Statutes legislating upon topics governed by the common law are "read with a presumption favoring the retention of long-established and familiar principles." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

Where, as here, Congress not only legislates upon a common law topic, but also uses common law terms, the inference is especially compelling. One of the cardinal rules of statutory interpretation is that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," it has done so intentionally. *Morissette v. United States*, 342 U.S. 246, 263 (1952). Accordingly, in the absence of clear direction to the contrary, use of a term of art "may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id.* It is therefore a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13 (1994) (citation omitted). In other words, the plain language of the statute requires reference to the common law.

This principle applies to the interpretation of Title VII. For example, just this past Term, this Court considered the extent to which employers are vicariously liable for compensatory damages for the discriminatory acts of their employees and "rel[ied] on the general common law of agency . . . to give meaning to these [statutory] terms." *See Ellerth*, 118 S. Ct. at 2265. The use of a common law term, the Court observed, was a congressional direction to "interpret Title VII based on agency principles." *Id.*; *see Faragher*, 118 S.Ct. at 2285.

II. SECTION 102 ADOPTED THE COMMON LAW STANDARD, WHICH PERMITTED PUNITIVE DAMAGES ONLY IN CASES OF EGREGIOUS MISCONDUCT

Congress has employed many different labels and concepts in imposing extracompensatory damages in federal statutes. It has provided for "liquidated damages," "civil penalt[ies]," "double damages" and "treble damages," just to name a few.[4] As a consequence, the decision to employ the term "punitive damages" in Section 102 is of obvious significance. Petitioner, however, completely ignores this term and its common law meaning. The use of the common law term "punitive damages," and the common law standards for punitive damages, fully justify the lower court's requirement of egregious misconduct.

A. The Use of the Term "Punitive Damages" Requires Reference to the Common Law

The principle requiring reference to the common law in statutory interpretation has been applied repeatedly in the punitive damages context. For example, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court considered whether municipalities are immune from punitive damages under 42 U.S.C. § 1983. Because municipal immunity from punitive damages was well established at common law, and nothing in either the text, legislative history, or purposes of Section 1983 suggested that Congress intended to depart from that rule, this Court concluded that Congress intended to incorporate that immunity into that provision. *See Fact Concerts*, 453 U.S. at 259-71; *see also Smith v. Wade*, 461 U.S. at 38-41, 51 (upholding award of punitive damages under Section 1983 based on common law standard). As

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[4] *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (liquidated damages); Health Insurance for the Aged Act, 42 U.S.C. § 1395y (double damages); Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1964 (treble damages); False Claims Act, 31 U.S.C. § 3729 (treble damages and civil penalties).

discussed below (*see infra* pp. 13-14), this Court has also specifically held that a statutory reference to "punitive damages" requires incorporation of the common law definition of such damages. *See Molzof*, 502 U.S. at 307 (relying upon *Morissette*, 342 U.S. 246). Thus, absent a clear statement to the contrary in either the text of the Act or its legislative history — which does not exist here (*see infra* pp. 15-17) — Section 102(b)'s reference to "punitive damages" must be interpreted as incorporating the common law principles relating to such damages.

B. At Common Law, Punitive Damages Were Available Only to Punish Egregious Misconduct

It is well-settled that at common law punitive damages were reserved for instances of egregious misconduct. The Restatement defines punitive damages as "damages . . . awarded against a person to punish him for his outrageous conduct," Restatement (Second) of Torts § 908(1) (1979), and observes that such damages "can be awarded only for conduct for which this remedy is appropriate — which is to say, conduct involving some element of outrage similar to that usually found in crime." *Id.* § 908, cmt. b. This requirement of outrageous misconduct reflects the common law of punitive damages.

In the first English case involving the doctrine, the Chief Justice of the King's Bench observed that punitive damages are "proof of the detestation of the jury to the action itself." *Wilkes v. Wood*, Lofft. 1, 18-19, Eng. Rep. 489, 498-99 (K.B. 1763); *see also Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 106-07 (1893) (describing *Wilkes* as the "most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution"). Writing for this Court when it first considered punitive damages, Justice Story similarly observed that punitive damages are justified by "gross and wanton outrage" and "lawless misconduct." *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818); *see also Smith v. Wade*, 461 U.S. at 49, 54 (noting that punitive damages are awarded to punish "'outrageous conduct'") (quotation omitted). Subsequent commentators have agreed that punitive damages are reserved for instances of "highly serious

misconduct." 1 D. Dobbs, *Dobbs on the Law of Remedies* § 3.11(2), at 468.[5]

While state of mind was certainly a relevant factor in assessing punitive damages, at common law an intent to violate the law or to disregard the law alone was not sufficient to warrant the imposition of punitive damages. Egregious misconduct was also required. As one commentator has observed, "[c]onduct and state of mind are two different things." 1 Dobbs, *Dobbs on Remedies* § 3.11(2), at 468. Although in analyzing punitive damages claims, "the two are usually rolled up together in the discussions," and "attention is usually given mainly to the mental state," the presence of egregious misconduct nonetheless remains an indispensable aspect of any valid punitive damages claim. *Id.* In short, punitive damages are only awarded "when the defendant is guilty of both a bad state of mind and highly serious misconduct." *Id.*

While some torts require proof of egregious misconduct so that punitive damages are routinely available whenever compensatory damages are available (*see Smith v. Wade*, 461 U.S. at 53-54), the same is not true of other intentional torts. The necessity of separate proof of egregious misconduct is demonstrated in many common law fraud cases, which, while not reflecting the unanimous view of the common law courts, certainly represent the better view. Although one of the traditional elements of fraud is an intent to deceive, some courts have refused to award punitive damages in fraud cases lacking truly egregious misconduct. These courts draw a distinction between "ordinary fraud, for which punitive damages

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[5] *See also* W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* § 2, at 9-10 (5th ed. 1984) (requiring "circumstances of aggravation or outrage, such as spite or 'malice' . . . or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton") (footnotes omitted); 1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 2.1(B), at 25 (3d ed. 1995) (noting that punitive damages require "some kind of outrageous conduct"); C. McCormick, *Damages* § 77 (1935) (noting that punitive damages "serve to give outlet, in cases of outrageous conduct, to the indignation of the jurors").

do not lie," and "gross fraud" aimed at the public in general or accompanied by aggravating factors, for which punitive damages are available. *Byrnes v. Faulkner, Dawkins & Sullivan*, 550 F.2d 1303, 1314 (2d Cir. 1977) (applying New York law); *see also* 37 C.J.S. *Fraud* § 144, at 489 (1943) (noting that punitive damages will not be awarded in the ordinary action of deceit, but only in cases involving "some violation of duty springing from a relation of trust or confidence, or where the fraud is gross or the case presents other extraordinary or exceptional circumstances clearly indicating malice and willfulness"); *see also* 4 L. Sand *et al.*, *Modern Federal Jury Instructions* ¶ 77.01, at 77-30 (1996) ("[p]unitive damages are appropriate only for especially shocking and offensive misconduct").[6]

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[6] *See also Southern Building & Loan Ass'n v. Dinsmore*, 144 So. 21, 23 (Ala. 1932) ("[p]unitive damages are recoverable . . . where defendant is guilty of gross fraud"); *Holcomb v. Hoffschneider*, 297 N.W.2d 210, 214 (Iowa 1980) ("not every fraud case permits an exemplary damages award; circumstances of aggravation are present in the fraud cases allowing such damages"); *Logsdon v. Graham Ford Co.*, 376 N.E.2d 1333, 1335 (Ohio 1978) (per curiam)(permitting punitive damages "in a fraud action where there is gross or malicious fraud or something showing a very corrupt condition of affairs"); *Laughlin v. Hopkinson*, 126 N.E. 591, 595 (Ill. 1920) ("in ordinary cases a recovery of exemplary damages will not be allowed . . . but such damages may be allowed where the wrong involves some violation of duty springing from a relation of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly showing malice and willfulness"); *Long v. McAllister*, 118 A. 506, 508 (Pa. 1922) (citations omitted) (exemplary damages only recoverable where "circumstances of extreme aggravation appear"); *see generally* 37 Am.Jur.2d *Fraud & Deceit* § 347, at 465 (1968) ("It is held that there may be a recovery of exemplary damages where the fraud, aimed at the public generally, is gross and involves high moral culpability.").

The contrary cases appear to rest on the view that all fraud is necessarily egregious, rather than the view that egregiousness is not required. *See Goben v. Barry*, 676 P.2d 90, 98 (Kan. 1984) ("[p]unitive damages may be awarded in the trial court's discretion whenever there is proof of fraud"). Not surprisingly, these cases typically involve clearly egregious conduct.

For example, in *Holcomb v. Hoffschneider*, a real estate agent falsely represented that the property sold to the plaintiffs in that case contained 6.6 acres, when it actually contained only 4.6. *See* 297 N.W.2d 210, 211 (Iowa 1980). Although the agent clearly acted with a conscious, if not a reckless, indifference towards the rights of the plaintiffs, the Iowa Supreme Court nonetheless rejected the suggestion that punitive or exemplary damages were available. The court observed that "not every fraud case permits an exemplary damage award; circumstances of aggravation are present in the fraud cases allowing such damages." *Id.* at 214; *see also id.* (noting that "additional circumstances of aggravation are essential"). Because the plaintiff's case in *Holcomb* was "at best . . . of the 'ordinary' or 'simple' fraud variety, unaggravated by circumstances warranting punitive damages," the Iowa Supreme Court upheld the denial of punitive damages despite the real estate agent's clearly culpable mental state. *Id.* at 215.[7]

Court decisions in other tort area also have adopted a similar standard. For example, in bad faith tort actions, even though the defendant by definition acts intentionally, some courts have required something more egregious before permitting punitive damages. As one court explained, "before punitive damages are awardable the evidence must reflect something more than the reck-

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See, e.g., id. at 97 (noting the defendant's breach of fiduciary duty and ousting of his co-venturer).

[7] Similarly, in *Logsdon v. Graham Ford Company*, the Ohio Supreme Court found the conduct in question too pedestrian to warrant punitive damages. In *Logsdon*, the defendant sold a truck equipped with a garbage packer based upon representations that both the chassis and the packer were new. In fact, however, the garbage packer had been previously owned. *See* 376 N.E.2d at 1334. Although the court sustained the award of compensatory damages, it upheld the trial court's refusal to instruct on punitive damages. *See id.* at 1335-36. Recognizing that the defendant "knowingly concealed . . . a fact material to the transaction" with an intention to induce the plaintiff to rely upon this deceit, the Ohio Supreme Court nonetheless concluded that the "actions on the part of appellant's salesman did not evidence malicious, wanton or gross fraud." *Id.* at 1336.

less disregard that is needed to support the bad faith claim." *Farr v. TransAmerica Occidental Life Ins. Co.*, 699 P.2d 376, 383 (Ariz. Ct. App. 1984); *see also Best Place, Inc. v. Penn America Ins. Co.*, 920 P.2d 334, 348 (Haw. 1996) ("[P]unitive damages may not be awarded in a bad faith tort case unless the evidence reflects 'something more' than the conduct necessary to establish the tort.").[8]

This approach — requiring proof of egregious misconduct for punitive damages — was specifically adopted in *Molzof v. United States*, 502 U.S. 301(1992). There, this Court interpreted a statute that like Section 102 refers to "punitive damages." It concluded that the statute should be interpreted in accordance with the common law and that the common law required egregious misconduct. Although the Equal Employment Opportunity Commission cites *Molzof*, see EEOC Br. at 23 n.15, neither petitioner nor her *amici* discuss the holding of this centrally relevant authority. Not surprisingly, they also fail to offer any reason why Section 102 should not also be read to incorporate the common law's requirement of egregious misconduct.

In *Molzof*, this Court construed the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.* The FTCA provides that the United States shall generally be liable in the same manner as any private defendant "but shall not be liable . . . for punitive damages." 28 U.S.C. § 2674. The plaintiff in *Molzof*, despite the availability of free medical care from the Government, sought to recover future medical expenses as well as damages for loss of enjoyment based upon medical malpractice at a Veteran's Administration hospital. *See Molzof*, 502 U.S. at 303. The Government contended that these damages were barred by the punitive damages exclusion because they bore no relation to compensation. The plaintiff urged that the

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[8] *See also Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983) (requiring more than the malice required to establish alienation of affections for punitive damages award); *but see, e.g., Weiss v. United Fire & Cas. Co.*, 541 N.W.2d 753, 765 (Wis. 1995); *Nassen v. National States Ins. Co.*, 494 N.W.2d 231, 238 (Iowa 1992).

exclusion should be construed only to cover damages intended to punish egregious misconduct. *See id.* at 305-06.

The Court understood the plaintiff to urge adoption of the common law definition of punitive damages, and agreed that the statute incorporated that definition:

> Petitioner argues that § 2674 must be interpreted so as to permit awards against the United States of those state-law damages which are intended by state law to act as compensation for injuries sustained as a result of the tort, and *to preclude awards of damages which are intended to act as punishment for egregious conduct. We understand petitioner to be suggesting that the Court define the term "punitive damages" by reference to traditional common law . . . . We agree* with petitioner's interpretation of the term "punitive damages," and conclude that the Government's reading of § 2674 is contrary to the statutory language.

Molzof, 502 U.S. at 305-06 (quotation and citations omitted) (emphasis added).

As the Court recognized, the term "punitive damages" is a "legal term of art that has a widely accepted common law meaning" and a "long pedigree in the law." *Id.*; *see also id.* at 311 (noting that "the concept of 'punitive damages' is deeply rooted in the common law"). Moreover, in direct contrast to the position adopted by petitioner in this case, the Court understood that "[t]he common law definition of 'punitive damages' focuses on the nature of the defendant's conduct." *Id.* at 307. The Court therefore invoked the principle that statutes using common law terms should be interpreted to incorporate their common law meanings, *see id.* (discussing *Morissette*), and finding no contrary direction overcoming that presumption, held that the FTCA's punitive damages exclusion incorporated the common law's requirement of egregious misconduct. *See id.* at 307-12. The decision in *Molzof* applies equally to the 1991 Civil Rights Act.

C. There is Nothing in the Statute Suggesting That Congress Did Not Intend to Incorporate the Common Law

Section 102 of the 1991 Civil Rights Act should similarly be interpreted as incorporating the common law requirement of egregious misconduct. That section clearly invokes the common law concept of punitive damages, mentioning the term not once, but four times.[9] There is no suggestion in the statute or the legislative history, much less the clear direction required to overcome the presumption, that a different standard should be applied.[10] Thus, as in *Molzof*, the reference to punitive damages in Section 102 must be interpreted as incorporating the common law's requirement of egregious misconduct.

Petitioner relies on this Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), for the proposition that Section 102 does not require outrageous misconduct. *See* Pet. Br. at 29-30. *Hazen* is, however, clearly inapposite. Although this Court rejected a requirement of outrageous conduct in that case, *see id.* at 615-16, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, does not use the term "punitive damages." Instead, the ADEA refers to "liquidated damages." 29 U.S.C. § 626(b). Furthermore, this Court has recognized that the ADEA's remedial provisions incorporate the "remedies and procedures of the [Fair Labor Standards Act]," *see Lorillard v. Pons*, 434 U.S. 575, 582 (1978), and not those of the common law. Section 102, by contrast,

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[9] *See* 42 U.S.C. § 1981a(a)(1) (authorizing recovery of "punitive damages"); *id.* § 1981a(a)(2) (same); *id.* § 1981a(b)(1) (stating when a complaining party may "recover punitive damages"); *id.* § 1981a(b)(3) (limiting "the amount of punitive damages awarded").

[10] The EEOC asserts that Congress' "articulation of the governing standard for punitive damages" is "a contrary indication signaling departure from the common law." EEOC Br. at 23 n.15 (quotation omitted). This assertion makes no sense. While Section 102(b) refers to a standard for awarding punitive damages, it is the *common law* standard. *See infra* pp.. 17-22.

incorporates common law remedies. *See supra* p. 7. Thus, petitioner's reliance upon *Hazen* is clearly misplaced.

Observing that Congress has used the term "punitive damages" in other statutes and that those statutes refer to a number of different mental states, petitioner asserts that the "existence of a culpable mental state is the sole criterion for the award of punitive damages" in all but one of these statutes. *See* Pet. Br. at 25-26 & nn. 29-36. In fact, however, none of the statutes cited by petitioner sheds light on the particular standard that Congress adopted in Section 102. A few of these statutes, including 18 U.S.C. § 2707, 42 U.S.C. § 14503, and 18 U.S.C. § 2724, were either enacted or amended in relevant part after 1991, and therefore are irrelevant to Congress' intent in passing the Civil Rights Act of 1991. Several of the statutes passed prior to the 1991 Act authorize punitive damages using variations on common law standards of culpability and therefore, contrary to petitioner's suggestion, do not indicate any intent to depart from the common law requirement of egregiousness.[11] While still others use language that may depart from this requirement of egregiousness,[12] those statutes would at most show that Congress knew how to depart from the common law when it wished to do so. Thus, the statutes cited by petitioner cast no doubt on Congress' intent to incorporate the common law into Section 102 of the 1991 Civil Rights Act.

Finally, adopting petitioner's interpretation would raise constitutional questions. As this Court has recognized, the egregiousness or reprehensibility of a defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a

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[11] *See, e.g.*, 11 U.S.C. § 363 (awarding punitive damages for "willful disregard"); 12 U.S.C. § 3417 ("willful or intentional" violations); 15 U.S.C. § 1681n ("willful" noncompliance); 26 U.S.C. § 7431 (willful or grossly negligent inspections or disclosures); 42 U.S.C. § 669a (willful or grossly negligent disclosure).

[12] *See, e.g.*, 15 U.S.C. § 78u (awarding punitive damages if violation is "willful, intentional, and without good faith"); 15 U.S.C. § 1116 (awarding punitive damages where "seizure was sought in bad faith").

punitive damages award." *BMW of North America v. Gore*, 517 U.S. 559, 575 (1996); *see also id.* at 575 n.23 ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.") (quoting Owen, *A Punitive Damages Overview*, 39 Vill. L. Rev. 363, 387 (1994)). Indeed, conduct that is "sufficiently reprehensible to give rise to tort liability," does not always "establish the high degree of culpability that warrants a substantial punitive damages award." *Id.* Even with Section 102's cap on damages, if this crucial "guidepost" of reprehensibility (*id.* at 574) were lacking, punitive damages awarded under Title VII would frequently be subject to serious constitutional challenge. As statutes should not be interpreted to raise constitutional questions, *see, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), Section 102 should be interpreted to incorporate the traditional common law requirement of egregious misconduct.

III. SECTION 102'S USE OF THE TERMS "MALICE" AND "RECKLESS INDIFFERENCE" ALSO INCORPORATES THE COMMON LAW

Like the statutory use of the term "punitive damages," Section 102's use of the terms "malice" and "reckless indifference" also evidences an intent to incorporate the common law. The use of that terminology certainly does not suggest that Congress meant to depart from common law requirements.

A. Section 102's Use of the Phrase "Reckless Indifference" Must Be Interpreted to Refer to a Culpable Disregard of a High Risk of Injury to Others.

Petitioner's reading of Section 102 purports to rely upon the "literal" meaning of the phrase "reckless indifference" read in isolation. *See* Pet. Br. at 34. This Court has, however, rejected this "blue-pencil style" of statutory interpretation. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (citation omitted). As this Court has repeatedly stated, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Statutes must instead

be read as a whole, *see id.*, which means at a minimum that statutory language must be read in light of the surrounding language. *See, e.g., United States v. Morton*, 467 U.S. 822, 828 (1984); *see generally Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (discussing the principle *noscitur a sociis*, "a word is known by the company it keeps"). As a consequence, Section 102's reference to "reckless indifference" must be read in light of that section's reference to "punitive damages" and the common law standards that the term connotes and incorporates into the statute.

In addition, the phrase "reckless indifference" must be read in light of its immediate statutory neighbor and alternative: the requirement of "malice." Even at common law, as used by courts, the term malice was a "versatile and ambiguous term, carrying a broad spectrum of meanings." *Smith v. Wade*, 461 U.S. at 39 & n.8. In tort law and in the punitive damages context, however, the range of its meanings was relatively limited. The dictionary definition of malice is an "intention or desire to harm another," *Webster's Third New Int'l Dictionary* 1367 (1986), and courts have often used malice in this sense in the punitive damages context. *See Smith v. Wade*, 461 U.S. at 39 n.8; *see also id.* at 60-64 & n.3 (Rehnquist, J., dissenting) (arguing that at common law malice was used exclusively in this sense).

More commonly in the punitive damages context, courts used malice to refer to intentional infliction of injury in circumstances where, "without 'deliberate mind' or 'formed design,' the offender had been so grossly and recklessly negligent, so wantonly indifferent to another's rights," that punishment was warranted. *Id.* at 39-40 n.8. As malice and reckless indifference are part of the same standard, reckless indifference is most naturally understood as a mental state short of intentional infliction of injury that constitutes a culpable awareness of the possibility of harmful consequences.

Given the "slipperiness" of common law terms, it should come as no surprise that in the punitive damages context, the mental states of malice and reckless indifference have often been treated as "equally culpable and deserving of punishment and deterrence." *Smith v. Wade*, 461 U.S. at 39, 43 n.10. At common law, Courts

have found that "reckless disregard of what may be the probable consequence of an act calculated to cause injury . . . is the equivalent of willful misconduct." *Lacey v. Louisville & N.R. Co.*, 152 F. 134, 136 (5th Cir. 1907); *see generally* 1 Dobbs, *Dobbs on Remedies* § 3.11(2), at 469-70.[13] Thus, reckless indifference clearly refers to a disregard for the risk of serious injurious consequences that is morally analogous to an intent to cause those consequences and therefore deserving of punishment. This intentional (or reckless) infliction of serious injury constitutes the egregious misconduct required by the common law.

B. Petitioner's Interpretation Cannot Be Reconciled with the Common Law

Ignoring the use of the term malice and the common law treatment of the malice-or-recklessness standard in the punitive damages context, petitioner asserts that "reckless indifference" under Section 102 should be interpreted to be nothing more than an unreasonable disregard for the potential illegality of one's conduct. *See* Pet. Br. at 14 (asserting that Section 102 authorizes punitive damages where a defendant "knew or should reasonably have realized that its conduct was probably unlawful"). Although petitioner spends pages and pages discussing how the term "reckless indifference" has been used in a number of constitutional and statutory contexts, *see id.* at 18-24, only a few of the cases cited there use recklessness in relation to potential illegality,[14] and none (besides *Smith v. Wade*)

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[13] *See also Cowen v. Winters*, 96 F. 929, 934-35 (6th Cir. 1899) ("The reckless indifference to the rights of others is equivalent to an intentional violation of them."); *Alabama G. S. Ry. Co. v. Hill*, 8 So. 90, 93 (Ala. 1890) (finding "such indifference to the probable consequences" of the defendant's conduct and the "safety of passengers . . . the equivalent of intentional wrong"); *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 494-95 (1871) (awarding punitive damages for "that reckless disregard . . . which is equally culpable").

[14] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985) (defining willful violation of the ADEA as one where "the employer knew or showed reckless disregard for the matter of whether its conduct was

focus on punitive damages.[15] These cases simply do not support petitioner's standard.

Indeed, many of the authorities cited by petitioner support the Chamber's interpretation. For example, *Black's Law Dictionary* defines recklessness as "'[t]he state of mind accompanying an act, which either pays no regard to its *probably and possibility injurious consequences*, or which, though foreseeing such consequences, persists in spite of such knowledge.'" Pet. Br. at 17 (quoting *Black's Law Dictionary* 1271) (emphasis added). Similarly, the Restatement defines recklessness as engaging in conduct that "'creates an unreasonable risk of physical harm to another.'" Pet. Br. at 25 n.28 (quoting Restatement (Second) of Torts § 500), and Prosser defines the "usual meaning" of reckless as the intentional performance of an act "'in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow.'" *Id.* at 14 n.19 (quoting W. Page Keeton, *Prosser & Keeton on the Law of Torts* § 34, at 213. Finally, two punitive damages jury instructions quoted by petitioner both define the relevant mental state in regard to harmful consequences, not potential

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prohibited by the ADEA") (citation omitted); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (applying *Thurston* standard to ADEA statute of limitations); *Hazen Paper Co. v. Biggins*, 507 U.S. at 614 (1993) (reaffirming *Thurston* standard of "willful" as "reckless disregard for the matter of whether its conduct was prohibited by the [statute]"); *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 44 (2d Cir. 1988) (applying *Thurston* to ADEA statute of limitations).

[15] *See Sacramento v. Lewis*, 118 S. Ct. 1708, 1711 (1998) (substantive due process); *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (Eighth Amendment); *Hazen v. Paper Co. v. Biggins*, 507 U.S. at 613 (liquidated damages); *Wilson v. Seiter*, 501 U.S. 294, 296-98 (1991) (Eighth Amendment); *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 133-34 (Fair Labor Standards Act); *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (Eighth Amendment); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 120 (liquidated damages); *Herbert v. Lando*, 441 U.S. 153, 160 (First Amendment) (1979); *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (Eighth Amendment); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (First Amendment).

illegality. *See* Pet. Br. at 14 n.19 (citing 1 Schlueter & Redden, *Punitive Damages* § 5.6(B)(4), at 298, 301 (quotations omitted)).

Nor does this Court's decision in *Smith v. Wade* support petitioner's interpretation. As petitioner points out, the Court did state that punitive damages are available when a defendant's conduct "involves reckless or callous indifference to the federally protected rights of others." 461 U.S. at 56. It is clear, however, from the context that the Court did not mean to indicate that punitive damages were available based upon knowledge of potential unlawfulness alone. Rather, as noted above, the Court saw recklessness as part of a spectrum ranging from "actual ill will, spite, or intent to injure" to "recklessness and negligence." *Id.* at 40-41, 43 n.10. The Court also saw no difference between "'reckless indifference to the rights of others'" and the "'entire want of care which would raise the presumption of a conscious indifference to consequences.'" *Id.* at 42-43 (emphasis omitted). Thus, in referring to reckless indifference to the rights of others, the Court clearly understood a substantial risk of harm to be implicit in the term reckless indifference — which is not surprising given that the petitioner in *Smith* was accused of reckless indifference to the right of a prisoner to personal safety and freedom from cruel and unusual punishment. *See id.* at 32-33.

This Court's acknowledgment that punitive damages are automatically available for some torts also does not help petitioner. *See* Pet. Br. at 28 (citing *Smith v. Wade*, 461 U.S. at 53). Each of the torts that *Smith* recognized as doing so — malicious prosecution, intentional infliction of emotional distress, defamation of public officials or public figures, and defamation subject to a common law qualified immunity — involves both egregious misconduct as an element of the tort and an abnormally high risk of substantial harm to the victim.[16] Thus, the fact that these torts

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[16] *See, e.g.*, Restatement (Second) of Torts § 653(a) (malicious prosecution requires the initiation or procurement of a criminal proceeding "for a purpose other than that of bringing an offender to justice"); *id.* § 46(1) (intentional infliction of emotional distress requires "extreme and

automatically warrant punitive damages neither supports petitioner's interpretation of reckless indifference nor justifies ignoring the common law requirement of egregious misconduct.

Finally, contrary to petitioner's contention, our interpretation is confirmed by the language of the Restatement. Although Section 908 of the Restatement states that punitive damages may be imposed where a defendant acts with either "evil motive or . . . reckless indifference to the rights of others," Restatement (Second) of Torts § 908(2), the Restatement refers to Section 500 for an explanation of the meaning of reckless indifference, *see id.* cmt. b, and Section 500 defines recklessness as knowing or having reason to know "of facts which create a high degree of risk of physical harm to another." *See id.* § 500, cmt. a; *see also id.* (noting that reckless conduct "must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent"). As used in Section 102, reckless indifference clearly refers to a high risk of injury, not mere awareness of illegality.

IV. THIS COURT SHOULD LOOK TO THE COMMON LAW TO DETERMINE WHEN PUNITIVE DAMAGES ARE PROPER AGAINST AN EMPLOYER FOR THE ACTS OF AN EMPLOYEE

Just as petitioner and her *amici* largely ignore the common law requirement of egregious misconduct, they also fail to address the question of an employer's common law exposure to punitive damages based upon the conduct of its employees. This is, however, a critical issue. As discussed earlier, *see supra* pp. 4-5 & n.2, Title VII imposes liability upon employers, not individuals. Consequently, in most Title VII cases the availability of punitive damages will depend not only upon whether the challenged conduct

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outrageous conduct" that "intentionally or recklessly causes severe emotional distress"); *id.* §§ 580A, 600 (requiring knowledge of falsity or disregard for the truth of a statement to overcome constitutional protections and common law immunities).

warrants punitive damages, but also upon the propriety of imposing vicarious liability for punitive damages upon the employer.

This Court should incorporate common law agency principles in defining the standard for vicarious liability for punitive damages. Only last Term this Court "rel[ied] on the general common law of agency . . . to give meaning to th[e] terms" "employer" and "agent" as used in Title VII. *Ellerth*, 118 S. Ct. at 2265 (applying the Restatement (Second) of Agency) (quotation omitted). At common law, employers can be subject to broad vicarious compensatory damages liability for the conduct of their employees, even for conduct outside the scope of employment. *See* Restatement (Second) of Agency § 219(2)(d) (1958) (holding principals liable any time an agent is "aided in accomplishing the tort by the existence of the agency relation"). Thus, this Court held employers vicariously liable for compensatory damages for discriminatory conduct by supervisory employees. *See Faragher*, 118 S. Ct. at 2292-93; *Ellerth*, 118 S. Ct. at 2270.

By contrast, the general rule at common law is that there is no vicarious liability for punitive damages. Indeed, when this Court first addressed a claim of punitive damages in *The Amiable Nancy*, it refused to impose punitive damages on a vicarious liability theory. Writing for the Court, Justice Story found the sort of "gross and wanton outrage" that would justify punitive damages, but refused to impose punitive damages on the owners of a ship for misconduct committed by the officer and crew because the owners were "innocent of the demerit of this transaction." 16 U.S. (3 Wheat.) at 558-59. Accordingly, the common law rule is that a principal may not "be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent." *Lake Shore*, 147 U.S. at 107. As even the dissent below seemed to recognize, *see Kolstad*, 139 F.3d at 974 (Tatel, J.), there should be at least some culpability on the part of the employer before punitive damages may be imposed for the conduct of its employees. *See, e.g.*, Restatement (Second) of Torts § 909, cmt. b (noting that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously"); McCormick, *Damages* § 80,

at 282 (finding "little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty").

The common law rule on vicarious liability for punitive damages has a number of permutations. Where a principal authorizes an agent's misconduct in advance or ratifies it after, the principal is subject to punitive damages for that misconduct. *See* Restatement (Second) of Agency § 217C(a) (authorizing punitive damages where "the principal authorized the doing and the manner of the act"); *id.* § 217C(d) (authorizing punitive damages where "the principal or managerial agent of the principal ratified or approved the act"). Courts have also imposed punitive damages upon principals that acted culpably in retaining a clearly unfit individual. *See id.* § 217C(b) (authorizing punitive damages where the "agent was unfit and the principal was reckless in employing him").

An employer may also be subject to punitive damages liability based upon the position and authority of an employee wrongdoer acting within the scope of employment. It is well settled, for example, that punitive damages are appropriate where a corporation acts "by its controlling officers" to further its interests because the actions of such officers are for all intents and purposes the actions of the employer. *Denver v. R. G. Ry. v. Harris*, 122 U.S. 597, 610 (1887). There is, however, some confusion among the lower courts as to the punitive damages liability of an employer based upon the actions of lower-level employees. Based upon the need for deterrence, a number of jurisdictions take the view that an employer is liable for punitive damages without regard to the position of the employee whenever tortious conduct is committed in the course of employment. *See Briner v. Hyslop*, 337 N.W.2d 858, 864, 865 (Iowa 1983) (noting that twenty states follow this rule); 2 J. Ghiardi *et al.*, *Punitive Damages: Law & Practice* § 24.07, at 24-19 & n.1 (1998).[17]

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[17] This approach has been the subject of significant criticism. *See, e.g.*, *Briner*, 337 N.W.2d at 865-67 (criticizing the rule as unnecessary and unfair); 2 J. Ghiardi *et al.*, *Punitive Damages* § 24.07, at 24-20 (noting that the cases adopting the rule contain "minimal analysis").

The traditional — and majority — position is stricter. This Court held almost one hundred years ago that employers may not be held liable for punitive damages based upon the conduct of a "subordinate agent or servant," that is, an ordinary low-level employee. *See Lake Shore*, 147 U.S. at 114. Following this position, a majority of courts have adopted the Restatement approach, which makes a principal liable for punitive damages if "the agent was employed in a managerial capacity and was acting in the scope of employment." Restatement (Second) of Agency § 217C(c); *see also Briner*, 337 N.W.2d at 863-64 (noting that twenty-two states follow either this rule or a more restrictive approach).

The Restatement explains the rationale for the majority approach:

> Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions.

Restatement (Second) of Torts § 909, cmt. b. The Restatement gives an example: the "operations manager" with overall responsibility in "a corporation owning a series of retail stores." *Id.* § 909, illus. 3.

There is some dispute among the courts adopting this approach as to the exact level an employee must occupy to be considered managerial for purposes of punitive damages. Although courts agree that an employee must have "power to make independent decisions" to qualify as a manager,[18] courts are divided over how much power is necessary: While some require only that the

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[18] *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1263-64 (10th Cir. 1995); *see also Gardner v. Federated Dep't Stores*, 907 F.2d 1348, 1352 (2d Cir. 1990) (refusing to impute punitive damages liability based upon the conduct of an "intermediate functionary").

employee supervise other employees and exercise some independent discretion, *see, e.g., Prospectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1387 (9th Cir. 1985), the better view requires some policy-making authority as well. *See, e.g., Gardner*, 907 F.2d at 1352; *see also Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 148 (Cal. 1979) ("[T]he critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.").

Whatever the precise standard for identifying managerial employees, one thing is clear: an employer is not liable for punitive damages based upon the conduct of even higher level managers if the managers are acting outside "the scope of employment." *See* Restatement (Second) of Agency § 217C(c) (requiring managers to act within the scope of their employment). This requirement will preclude the award of punitive damages in many cases because when an employee is "[a]cting purely from personal ill will," their actions are not within the scope of employment. *Ellerth*, 118 S.Ct. at 2266.[19] Thus, in cases where an employee acts out of race- or "gender-based animus or a desire to fulfill sexual urges," the employee will not be acting within the scope of employment. *Ellerth*, 118 S. Ct. at 2266-67 (quotation omitted).

An even stricter scope of employment standard is appropriate for punitive damages where a managerial employee engaging in intentional discrimination acts directly contrary to a clearly articulated and consistently enforced company policy. That employee should therefore also be viewed as acting outside the scope of employment for the purposes of punitive damages.[20]

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[19] *See also id.* at 2267 (noting that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment"); Restatement (Second) of Agency § 235, Illus. 2; F. Mechem, *Outlines of the Law of Agency* § 368, at 248 (P. Mechem 4th ed. 1952) (noting that an agent "conspicuously and unmistakably seeking a personal end" acts outside of the scope of employment).

[20] A less demanding standard, of course, would continue to apply for compensatory damages. As this Court noted last Term, "[t]he Restatement defines conduct, including an intentional tort, to be within the scope of employment when 'actuated, at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer." *Ellerth*, 118 S.Ct. at 2266 (quotation omitted).

Consequently, where even the conduct of managerial-level employees is at issue, employers who implement and operate antidiscrimination programs in good faith should not be subject to punitive damages vicariously.

The policies underlying Title VII strongly support this result. As this Court recognized last Term, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Ellerth*, 118 S.Ct. at 2270; *see also* H.R. Rep. No. 40(I), at 65, 102d Cong. 1st Sess. (1991) (noting that one of the purposes of the damages remedies in the Civil Rights Act of 1991 is to "provid[e] employers with additional incentives to *prevent* intentional discrimination in the workplace before it happens"). Interpreting Title VII in the context of punitive damages to "give credit here to employers who make reasonable efforts to discharge their duty" furthers these basic policies of "encouraging forethought by employers and saving action by objecting employees." *Faragher*, 118 S. Ct. at 2292. Indeed, "a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive." *Id.* Thus, even if the common law did not afford protection, Title VII's policy of encouraging conciliation and voluntary compliance would require protection from punitive damages for employers who have complied with the statutory policies. *See id.* at 2292-93; *Ellerth*, 118 S. Ct. at 2270. Simply put, employers who are not culpable and have taken affirmative steps to prevent and punish discrimination should not be subject to punitive damages liability.

V. THE COURT SHOULD ARTICULATE THE RELEVANT FACTORS

As the preceding discussion suggests, the common law background against which Section 102 was enacted dictates a two-part process for the evaluation of punitive damages claims.

First, the Court must determine whether the conduct in question warrants punitive damages. As discussed above, this inquiry has a dual aspect: the actor must have intentionally or recklessly engaged in egregious misconduct. In making this inquiry, the Court should look to a number of factors:

• Intent to Violate or Reckless Disregard of the Law — Although not sufficient in and of itself to justify the imposition of punitive damages, an intent to violate or reckless disregard of the law is necessary. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

• Serious Injury — In order for conduct to be egregious, the harm involved must be serious. It is not, however, necessary that such injury be actually inflicted. Punitive damages can and should be imposed where serious injury has been threatened but not realized. *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-62 (1993) ("[t]aking account of the potential harm that might result from the defendant's conduct").

• Repeated Misconduct — Even where the actual or threatened injury in a particular case is not serious taken alone, if the individual has engaged in repeated acts that in the aggregate threatened serious injury, that conduct may be deemed egregious. *See, e.g., BMW*, 517 U.S. at 576-77. As this Court has recognized, "repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 577. In the context of Title VII suits against an employer, this principle applies whether the conduct in question involved repeated actions taken by several employees against an individual or repeated acts of one employee against a number of others.

• Scope of Harm — Courts should also consider whether the conduct in question affects a single person or a class of individuals.

Second, where punitive damages are claimed against an employer because of the acts of an employee, the court must determine when the employer should be held responsible for the employee's conduct. In unusual cases where the discrimination results from the employer's own action (for example, a policy requiring discrimination by employees) the employer will be directly implicated in, and responsible for, the conduct in question. In the majority of situations, where that is not the case, the question will be whether the employer should be held vicariously responsible for the conduct of its employees. The considerations relevant to this determination are generally those set forth in Section 217C of the Restatement (Second) of Agency. *See also* Restatement (Second) of Agency § 217C cmt. a (noting that Section 908 of the Restatement (Second) of Torts sets forth the same criteria). As noted above, punitive damages should only be awarded against an employer for the acts of an employee where (i) the employer authorized the doing and the manner of the offending act; (ii) the employee was unfit and the employer was reckless in employing or retaining him; (iii) the employee was a high level managerial employee and was acting in the scope of employment and not acting contrary to clearly articulated and consistently enforced company policy; or (iv) the employer ratified or approved the offending act.

CONCLUSION

For the foregoing reasons, this Court should adopt the punitive damages standard articulated by the Court below, with the modifications suggested herein.

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Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and the administrative process in a variety of areas of the law, WLF devotes a substantial portion of its resources to cases raising civil rights issues. In this regard, WLF has appeared as amicus curiae in numerous civil rights cases before this Court. *See, e.g.*, *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). WLF has also appeared as amicus in punitive damages cases before this Court. *See, e.g.*, *BMW of North America v. Gore*, 517 U.S. 559 (1996). WLF's Legal Studies Division also publishes monographs and other publications on these and other pertinent issues, such as Title VII of the Civil Rights Act of 1964.

WLF believes that it can present a broader perspective to this case than the parties, and that its participation as an amicus will assist the Court in resolving the issue before it.

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[1] Pursuant to Supreme Court Rule 37.6, amicus represents that no counsel for either party authored this brief either in whole or part. Furthermore, no persons or entities, other than amicus curiae, its supporters, or counsel, contributed financially to the preparation or submission of this brief. This brief is being filed with the written consents of all the parties which have been filed with the Clerk.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts by reference the Statement of the Case as presented in the brief of the respondent. In brief, petitioner, a female employee, filed a lawsuit against her employer, respondent American Dental Association, alleging that the promotion of a male employee to the vacant position of Director of Legislation and Legislative Policy constituted sex discrimination in violation of Title VII, 42 U.S.C. §2000(e), *et seq.* She sought equitable relief, compensatory and punitive damages under 42 U.S.C. §1981a(b)(1), and attorneys' fees.

After trial, the jury awarded petitioner $52,718 in back pay on the issue of liability. *Kolstad v. American Dental Association*, 139 F.3d 958, 961 (D.C. Cir. 1998), J.A. 109-10. The district court refused to instruct the jury on punitive damages; denied respondent's motion for judgment as a matter of law on the issue of liability; and held that petitioner was not entitled to instatement to the position. *Id.* at 960-61. The district court also denied petitioner's request for her attorneys' fees.

The trial judge held that he would have set the jury verdict aside, pursuant to Fed.R.Civ.P. 50(c), if it was within his power to do so. *Kolstad*, 912 F.Supp. 13, 14-15 (D.D.C. 1996). He observed that all of respondent's officials, both male and female alike, who had knowledge of the job duties and the two candidates, testified that the male candidate was better qualified for the job. "For aught that appears in this record their genders might have been reversed, or they of the same sex. That one was male and one was female is a mere fortuity." *Id.* at 14.

A divided panel of the U.S. Court of Appeals for District of Columbia Circuit reversed the dismissal of the

punitive damages claim and remanded on both the punitive damages and attorneys' fees issues. *Kolstad,* 108 F.3d 1431, 1437-39 (D.C. Cir. 1997). The court of appeals granted *en banc* review and reversed the panel decision with respect to punitive damages. The court rejected the view that punitive damages are available in Title VII in all but a narrow range of disparate treatment cases, where, in essence, the plaintiff demonstrates nothing higher than the minimal standard for imposing liability and the award of compensatory damages. *Kolstad,* 139 F.3d at 960. The court further held that the standard required for imposition of punitive damages was "egregious" conduct, but found that there was no such conduct in this case. Therefore, the court of appeals affirmed the district court's decision not to submit the issue of punitive damages to the jury.

SUMMARY OF ARGUMENT

The statutory language and structure of 42 U.S.C. § 1981a clearly establishes a two-tiered liability standard for compensatory damages (all cases of intentional discrimination) and punitive damages (a subset of intentional discrimination), which requires a plaintiff to demonstrate a higher degree of egregious discriminatory conduct on the part of the defendant. Any other construction of the statute would render §1981a(b)(1) mere surplusage, contrary to the legislative intent.

Petitioner's superficial "plain meaning" argument that "reckless" conduct is something more than negligence but less than intentional conduct, leads to an illogical or absurd conclusion: that Congress intended punitive damages to be available where the conduct does not even rise to the minimal level of intent necessary for finding liability for the award of compensatory damages. Consequently, an examination of legislative history and prior case law is

appropriate to determine the legislative intent of the punitive damages provision of § 1981a.

The legislative history and case law, under the 1866 and 1871 Civil Rights Act, 42 U.S.C. §§1981 and 1983, support the conclusion reached by the court below that the award of punitive damages requires a showing of "egregious" conduct. Comments from both sides of the legislative aisle support this standard.

Important policy conditions further support the two-tiered approach to punitive damages and the "egregious conduct" standard. Making punitive damages awards available in every garden variety lawsuit would encourage complaining parties to litigate unnecessarily rather than obtain a prompt administrative resolution of their EEOC charges. This is contrary to the purpose of Title VII which is to foster conciliation and prompt resolution of cases. Furthermore, punitive damages, which are designed to deter reprehensible conduct, cannot deter the everyday personnel decisions that must be made by employers. They presumably have some non-discriminatory rationale for making those decisions. The liberal availability of punitive damages as urged by the petitioner will lead to over-deterrence, forcing conscious or unconscious quota-like decisions by employers in the workplace, contrary to sound public policy.

The court below also correctly decided that the sufficiency of the evidence supporting a punitive damage award is a question of law, in the first instance. This aspect of the decision comports with Fed.R.Civ.P. 50 and 59.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT PUNITIVE DAMAGES MAY BE AWARDED ONLY IF THE INTENTIONAL DISCRIMINATORY CONDUCT WAS EGREGIOUS

A. Congress Intended A "Two-Tiered" Structure For An Award of Compensatory and Punitive Damages

Section 1981a(a)(1) provides that a "complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section" against an employer which engaged in "unlawful intentional discrimination." Subsection (b) provides that punitive damages may be awarded only when "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Petitioner argues that punitive damages may be awarded in every case where the plaintiff has satisfied her minimal burden of proving intentional discrimination because the plain meaning of "reckless indifference" allegedly is conduct that is less than intentional. This isolated reading of the punitive damages provision does violence to the overall statutory scheme, is contrary to congressional intent, against the weight of authority, and contrary to sound public policy.

The cardinal purpose of statutory construction is to determine and interpret statutes in accordance with legislative intent. *See, e.g., Norfolk Redevelopment and*

Housing Authority v. C & P Telephone Co., 464 U.S. 30, 36 (1983). Amicus EEOC acknowledges that "the ultimate question is one of Congressional intent." United States and EEOC Amici Curiae Brief at 17-18 (hereinafter EEOC Br.), *citing Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). All of the rules of statutory construction are designed to aid the Court in ascertaining that congressional intent.[2]

Although the plain meaning of a statute may often be indicative of Congressional intent, "the Court must not be guided by a single sentence or a member of a sentence, but must look to the provisions of the whole law and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) *quoting Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222 (1986). It is axiomatic that the plain meaning of a statutory provision cannot reasonably be determined by reviewing the provision in a vacuum: "Over and over we have stressed that in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and

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[2] Petitioner and her amici's strict reliance upon the plain meaining rule ignores other applicable rules of statutory construction to determine legislative intent. For example, in *Moskal v. United States*, 498 U.S. 103 (1990), cited by petitioner (Pet. Br. at 15), the Court dismissed the petitioner's common law meaning of a statutory term, finding that it "violates the established principle that a Court should give effect, if possible, to every clause and word of a statute." *Id.* at 109-110. As amicus will further argue, *infra*, petitioner's interpretation would render the "malice or with reckless indifference" phrase of the punitive damages provisions of §1981a(b)(1) as mere surplusage, since punitive damages could be awarded in every intentional discrimination case where compensatory damages are awarded.

to its object and policy." *U.S. National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 455 (1993).

Courts have long followed the doctrine of *noscitur a socius* ("a word is known by the company it keeps") in determining the meaning of a word or phrase in the statute. This rule aids the Court in avoiding ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). Statutes are not to be interpreted so as to produce incongruous results, as would occur under petitioner's construction of the punitive damages provision. *See, e.g., Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 286-87 (1956).

Moreover, it is a "fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which is it used." *Deal v. U.S.*, 508 U.S. 129, 132 (1993). This principle is also acknowledged by amicus EEOC when it cites *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993) for the proposition that, "a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends upon context." EEOC Br. at 12.

The plain meaning rule cannot possibly determine congressional intent in this case as petitioner claims. Petitioner contends that in every case of intentional discrimination there is at least "reckless" conduct and, therefore, an award of punitive damages is always at the discretion of the jury. Pet. Br. at 14. In fact, the term "reckless" falls on a continuum of conduct -- more than negligent, less than intentional. W. Page Keeton, et al., *Prosser and Keeton on The Law of Torts*, § 34 (5th ed. 1984).

The fallacy of petitioner's argument is self-evident because it leads to the absurd result that punitive damages can be awarded on a lesser showing of intent than that which is the minimum necessary to impose liability for compensatory damages. *See, e.g., Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941). Congress clearly sought to require "something more" than intentional discrimination for an award of punitive damages. Otherwise, petitioner's interpretation would write out the entire damages clause of §1981a(b)(1), which was written as a modifier to §1981a(a) which requires intent to impose liability. Section 1981(a)(1) provides that a "complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section. . . ." Section 1981a(b)(1) provides that punitive damages may be awarded only when "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

If all that is required for an award of punitive damages is a showing of intentional discrimination, there would have been no reason to enact subsection (b)(1). This violates another venerable rule of statutory construction that all parts of a statute must be harmonized to avoid an interpretation that renders some words redundant or the "broader" terminology superfluous. *See, e.g., United States v. Alaska*, 117 S.Ct. 1888, 1918 (1997); *see also Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 846 (1997) (the "plainess or ambiguity of statutory language is determined by refernce to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole"). The *Robinson* Court found that the word "employee" may have a plain meaning in one context but a different meaning in another context within the same statute. *Id.* at 847.

Using this Court's principles of statutory construction, the court below correctly determined that there is a two-tiered scheme of liability which the plaintiff must "demonstrate" in Title VII litigation for the award of both compensatory and punitive damages. Indeed, EEOC concedes that "a finding of intentional discrimination, *without more*, does not automatically make a plaintiff eligible to receive punitive damages." EEOC Br. at 9 (emphasis added).

However, the EEOC argues that in all but a very few limited circumstances, punitive damages should be submitted to the jury, thereby giving short shrift to the very same two-tiered structure of the law which EEOC agrees congress intended. The EEOC believes that punitive damages can be awarded in all cases except in the following limited circumstances: the employer acted upon a mistaken good faith belief that the trait is a *bona fide* occupational qualification ("BFOQ"), 42 U.S.C. §2000e-2(e); the employer engaged in a valid effort to remedy the effects of past discrimination; the employer is not obliged to accommodate a particular religious exercise because of undue hardship, 42 U.S.C. §2000e(j); the employee falls under the "personal staff" exception to Title VII, which exception applies only to the staff of elected public officials, 42 U.S.C. §2000e(f); or when a novel legal theory is asserted. EEOC Br. at 16. These very narrow exceptions are essentially illusory because it would make punitive damages available in almost every garden variety case of discrimination.

Where, as here, the statutory language in question is unclear, leads to illogical results, or thwarts the purpose of the Act, the Court looks to the legislative history to discern congressional intent. *See, e.g., Commissioner v. Estate of Bosch*, 387 U.S. 456, 463-64 (1967). The terms of the statute are to be interpreted in light of their historical usage

and the Courts may avail themselves of the legislative history of the statute, its antecedents, or contemporaneous legislation. *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v Lauer*, 49 F.3d 323, 327 (7th Cir. 1995). Consequently, the court below correctly examined the legislative history[3] and case law in concluding that "egregious conduct" is the necessary predicate for submitting the issue punitive damages to the jury.

B. The Legislative History of Section 1981a

If the Court believes that the legislative intent cannot be clearly discerned from the language of the punitive damages provision, the Court may properly examine the relevant legislative history to determine congressional intent.[4]

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[3] If Congress wanted the courts to limit their search for applicable legislative history in interpreting the punitive damages provision, it could have easily done so, but chose not to do so here. *Compare* Pub. L. 102-66, §105(b), 105 Stat. 1071 (1992), where Congress expressly limited the applicable legislative history for the proper interpretation of the "*Wards Cove*" provision of that legislation, to specified portions of the Congressional Record.

[4] Amicus EEOC cites *Landgraf v. USI Film Products*, 511 U.S. 244, 262-63 (1994) as somehow standing for the proposition that the legislative history should be viewed with skepticism because of "frankly partisan statements." EEOC Br. at 27. However, the *Landgraf* decision was solely concerned with the issue of whether the right to recover compensatory and punitive damages should be made retroactive to pending cases. That contentious issue included proposals from both sides of the aisle. *Landgraf, supra*, at 262-63. Nevertheless, the *Landgraf*

1. The 1990 Civil Rights Restoration Act

The starting point for the legislative history of the 1991 Civil Rights Act is its immediate predecessor, S. 2106, 101st Cong., 2d Sess (1990), also known as the 1990 Civil Rights Restoration Act.[5] *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244, 261-62. The chief Democratic sponsor of this legislative proposal, Senator Edward Kennedy, stated that this statute:

> "repairs a serious gap in Federal law caused by the lack of effectiveness [*sic*] remedies for women and certain other minorities in job discrimination cases.... The Act closes these serious loopholes by granting victims of intentional sex and religious discrimination the right to recover compensatory damages *and, in particularly flagrant cases, punitive damages as well.*"

Court relied on "*[t]he relevant legislative history of the 1991 Act*" to reinforce "its conclusion that §§402(a), 109(c) and 402(b) cannot bear the weight petitioner places on them." *Id.* at 262 (emphasis added). Clearly, the proper use of legislative history is just as warranted in this case as it was in *Landgraf*.

[5] S. 2106 was enacted by both Houses of Congress but vetoed by then President Bush. 136 Cong. Rec. S 16418 (Oct. 22, 1990). Congress failed by only one vote to overrule the veto. Thus, unlike legislation that may have failed passage in either House, S. 2106 reflected the legislative wishes of both Houses. Consequently, the legislative history of the 1990 Act is helpful in discerning the intent of the immediate subsequent Congress which enacted the identical punitive damages provision of S. 2106 (albeit with a cap on the amount of damages). *See* 2A Sutherland Statutory Construction § 48.03 (5th ed.); *United States v. The Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222-23, n.6 (1952).

136 Cong. Rec. 16706 (emphasis added). Senator Kennedy continued to explain that these are the same remedies available under §1981 of the 1866 Civil Rights Act. Senator Kennedy provided the example of Patricia Swanson, which involved flagrant facts, as the kind of case that warranted these additional damage remedies.[6]

The Senate Report, S. Rep. 315, 101st Cong., 2d Sess. (1990), discusses Ms. Swanson's congressional testimony of her plight as a "tragic" case. *Id.* at 30. The circumstances included a parade of horrible allegations of continuous sexual harassment by her supervisor over a one-year period, which caused her to cry and experience serious migraine headaches. *Id.* at 30-31. The Court concluded that although she had been sexually harassed, she was terminated for unrelated reasons and could not be awarded any damages. She was ultimately found liable for the employer's court costs. *Id.* at 31. This example is precisely the type of "egregious" and "flagrant" conduct which justifies the exercise of jury discretion to award not only compensatory damages, but also punitive damages.

The House Report on H.R. 4000, the companion bill to S. 2106, is even more instructive on the Congressional intent. *See* H.R. Rep. No. 644, Pt. 1, 101st Cong., 2d Sess. (1990). In discussing the need to conform Title VII

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[6] H.R. Rep. No. 644, Pt. 1, at 38-42, and Pt. 2, at 33-34, discussed two similarly egregious fact situations of a Ms. Brooms, Ms. Zabkowicz, and Ms. Harrington, who were also barraged by continuous, aggravated, and pronounced sexual harassment. Indeed, the Court in the *Zabkowicz* case found that she had suffered "*malevolent and outrageous harassment*", which was "*sustained, vicious, and brutal harassment.*" *Id.* at 34 (emphasis added). Thus, egregious and outrageous cases of discrimination, rather than the garden variety Title VII cases, were the target for the imposition of punitive damages.

remedies to those available under § 1981, the Majority Report stated that victims of discrimination under § 1981 are entitled "not only to equitable relief, but also compensatory damages, *and in particularly egregious cases, punitive damages as well.* *Id.* at 38 (emphasis added). This is precisely the standard adopted by the court below and numerous other courts of appeals.

2. The 1991 Civil Rights Act

On April 24, 1991, Representative Ford, one of the chief Democratic sponsors of H.R.1,[7] submitted the Committee on Education and Labor Report, H.R. Rep. 40, Pt. 1, 102d Cong., 1st Sess. (1991). The Report found the need to conform the federal remedies for race and gender discrimination. *Id.* at 65. The Committee Report noted that "*in particularly egregious cases*" (emphasis added), punitive damages are available under § 1981. *Id.* The Committee Report further notes that "[b]y contrast, victims of intentional gender or religious discrimination may receive under Title VII injunctive relief, reinstatement or hiring, and up to two years' backpay, *but the statute does not permit awards of compensatory or punitive damages no matter how egregious the circumstances of their case.*" *Id.* (emphasis added). Once again, the legislative history supports the court of appeal's conclusion that punitive damages would be an available tool only in "egregious cases."

The legislative language of "malice or reckless indifference" was admittedly derived from case law that

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[7] H.R. 1, the initial version of the 1991 Civil Rights Act, like the failed 1990 Civil Rights Restoration Act, contained no statutory cap for compensatory or punitive damages.

developed under § 1981 and set forth in this Court's decision in *Smith v. Wade*. 461 U.S. 30 (1983). *Id.* at 74. But there is no inherent conflict between the Majority Report's stated purpose of the legislation -- to allow punitive damages in egregious cases -- and the legislative language used, as suggested by petitioner and her amici. The intent is clear: punitive damages are to be awarded only in egregious cases.

Amicus further refers this Court to the discussion of the legislative history by the court below. *Kolstad*, 139 F.3d at 962-63. That record reveals statements made on both sides of the aisle, after the hastily reached compromise, which support the "heavy burden" that must be met to warrant an award of punitive damages (Senator Bumpers' statement). 137 Cong. Rec. S15479 (Oct. 30, 1991); *see also* 137 Cong. Rec. S 15743 (Oct. 30, 1991) (Interp. Memo of Senator Dole, *et al.*) (punitive damages would be available in "extraordinarily egregious cases.")

Thus, the legislative record from both sides of the aisle contains references to the terms "flagrant" and "egregious" and discusses cases which reflect outrageous conduct, not the kind of garden variety discrimination that was found to have occurred in this case. This legislative history thus supports the court of appeal's holding that a heightened "egregious" standard for an award of punitive damages is required.

C. *Smith v. Wade* And Its Progeny -- Defining The Malice Or Reckless Indifference Standard

The genesis of punitive damages awards in civil rights litigation can be found in this Court's 5-4 decision in *Smith*

v. Wade, 461 U.S. 30 (1983).[8] In that case, this Court, approved an award of punitive damages in a claim under 42 U.S.C. § 1983. In *Smith*, the jury was instructed that punitive damages might be awarded for "an egregious failure to protect Wade (defined as a flagrant or remarkably bad failure to protect)." *Id.* at 33.

The facts of the case demonstrated flagrant and egregious misconduct by the defendant, a prison guard, for failing to protect a youthful first offender prisoner from "physical abuse of such base, inhumane and barbaric proportions as to shock the sensibilities." *Id.* at 32. The guard placed a third inmate (who was in the particular unit because of prior fighting) into plaintiff's two-person jail cell, even though the plaintiff had been victimized by prior acts of violence. The Court adopted the following punitive damages standard: "evil motive or intent, or when it involves reckless or callous indifference. . . ." *Id.* at 56.

As the court of appeals noted, the *Smith* majority made clear that "deterrence of future *egregious* conduct is a primary purpose . . . of punitive damages." *Id.* at 49. This decision was the predicate for numerous decisions affirming punitive damages and also the statutory language. *See* H.R. Rep. No. 40, Pt. 1, at 74 (1991).

In his cogent dissent in *Smith v. Wade*, then Associate Justice William Rehnquist thoroughly examined the history and purposes of punitive damages, which are imposed as punishment and intended to serve as a deterrent. *Smith*, 461 U.S. at 58-59. These quasi-criminal penalties,

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[8] In *Carey v. Piphus*, 435 U.S. 247 (1978), this Court refused to rule on whether punitive damages were available under §1983 because the district court found that the defendants did not act with "malicious intent" to deprive rights. *Id.* at 257, n.11.

however, are unaccompanied by the procedural safeguards available in the criminal process; they are also subject to the "caprice and prejudice of jurors" which may be used to punish unpopular defendants rather than focusing on the conduct. *Id.* at 59. *See also* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795, 1816-23 (1992); Schlueter and Redden, *Punitive Damages*, § 2.2(A)(2) (3d ed. 1995). Justice Rehnquist further observed that any value of deterrence would likely be outweighed by the encouragement of unnecessary litigation. *Smith*, *supra*, 461 U.S. at 59.[9] The *Smith* dissent further reviewed case law cited by the majority and found that it supported the notion that the reckless indifference standard is grounded on a willful and malicious "spirit of mischief or criminal indifference" standard. *Id.* at 74. *See also The Philadelphia, Wilmington, Baltimore R.R. Co. v. Quigley*, 62 U.S. 202, 214 (1859). Consequently, punitive damages should only be available upon a showing of the "requisite intent" (malice or wanton or oppressively done). *See, e.g., Memphis Community School District v. Stachura*, 477 U.S. 299, 306, n.9 (1986).

While amicus believes that the dissent had the better of the argument in *Smith v. Wade,* the conduct at issue in that case was nevertheless egregious and outrageous, even if the expressed standard was "reckless or callous indifference." As noted by the court below, the case law in the aftermath of *Smith* is split on whether the standard to impose for intentional discrimination is sufficient, without more, to

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[9] *See* related discussion by amicus of this "unnecessary litigation" argument in the context of Title VII cases, *infra*, at 24.

support an award of punitive damages. *Kolstad*, 139 F.3d at 963-66.

In applying the *Smith v. Wade* standard to a Section 1983 case where the plaintiff asserted that a demotion was politically motivated, then Circuit Judge Stephen Breyer held:

> Thus, neither the common law, nor the Supreme Court in *Smith*, allows a jury to assess punitive damages in every single instance where it finds an intentional tort; *rather, they require conduct that is "outrageous,"* either because of a person's "evil motive" or because of his "reckless indifference" to the rights of others.

Hernandez-Tirado v. Artau, 874 F.2d 866, 869 (1st Cir. 1989) (emphasis added). *See also Ivey v. Wilson*, 832 F.2d 950, 956 (6th Cir. 1987) (requiring a showing of "ill will" or "bad faith"); *Coleman v. Rahija*, 114 F.3d 778, 788 (8th Cir. 1997) (focus on intent of defendant and reverses award of punitive damages because the conduct was not sufficiently "egregious"); *Cornell v. Woods*, 69 F.3d 1383, 1391 (8th Cir. 1995) (conduct did not rise to the "level of egregiousness"); *Wolfel v. Bates*, 707 F.2d 932, 934 (6th Cir. 1983).

The egregious standard is not surprising, in view of the purposes of punitive damages. As this Court recently held in *BMW of North America v. Gore*, 116 U.S. 559 (1996), the reasonableness of a punitive damage award for constitutional purposes must be based on the "*degree of reprehensibility* of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense. [citations omitted]. This principle reflects the accepted view that some wrongs are more blameworthy than others." *Id.* at 568.

Thus, for purposes of determining the constitutionality of excessive punitive damages, courts must examine the degree of wrongdoing; the flagrancy or egregiousness of the conduct; and the illicit motive of the actor. Amicus submits that these are the terms used throughout the legislative history of the 1991 Civil Rights Act; comports with the common law principles which support an award of punitive damages; and more accurately reflect the legislative intent in the enactment of the new punitive damages provision.

D. Courts of Appeals Decisions Under Section 1981

As the court below noted, numerous other courts of appeals have held that under §1981, punitive damages are awarded to punish or deter "particularly egregious" conduct. *Stephens v. South Atlantic Canners*, 848 F.2d 484, 489-90 (4th Cir. 1988) (not every lawsuit calls for submission of this extraordinary remedy to the jury); *Beauford v. Sisters of Mercy - Province of Detroit*, 816 F.2d 1104, 1109 (6th Cir. 1987) (requires evidence of egregious conduct, willfulness or malice and, therefore, affirmed district court's refusal to submit punitive damage award to a jury in a promotion discrimination case);[10] *Walters v. City of Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986) (requires "ill will" in refusal to hire case and reverses jury award of punitive damages); *Yarbrough v. Tower Oldsmobile, inc.*, 789 F.2d 508, 514 (7th Cir. 1986) (purpose of punitive damages is to punish "outrageous"

[10] The *Beuford* case is particularly noteworthy because it was one of the cases cited in the legislative history of the 1991 Civil Rights Act. *See Kolstad*, 139 F.3d at 963. ***But see Rowlett v. Anheuser-Busch, Inc.***, 832 F.2d 194, 205 (1st Cir. 1987).

conduct); *Jackson v. Pool Mortgage Co.*, 868 F.2d 1178, 1182 (10th Cir. 1989)(requiring "personal animosity" toward plaintiff).

Thus, at the time Congress enacted § 1981a, the majority of courts applying the "reckless indifference" standard, under § 1981, required proof of egregious, outrageous, or other high level spite or ill-will.[11]

E. The Clear Majority Of Circuit Courts Applying Section 1981a Under Title VII Require "Egregious" Or "Outrageous" Conduct

Seven other circuit courts of appeals -- the First, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth -- have all joined the District of Columbia Circuit in adopting the heightened two-tiered standard of liability.[12] In *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996), the Court relying on then Judge Breyer's decision in *Hernandez-Tirado, supra*, and *Rowlett, supra*, held that

[11] This Court made the issue of punitive damages under §1981 litigation largely moot in its decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Racial discrimination claims were relegated for the most part (hiring decision excluded) to the equitable remedies that then existed under Title VII. The issue is once again relevant in § 1981 litigation, because Section 101 of Pub. L. 102-166, 105 Stat. 1071, overturned *Patterson*.

[12] The Fifth Circuit has implicitly adopted the two-tiered standard when it concluded that no reasonable juror could find the requisite malice or reckless indifference in a case in which the court simultaneously affirmed the award of compensatory damages. *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 809-10 (5th Cir. 1996).

punitive damages are necessary to punish [the defendant] for his *outrageous conduct* and deter him from similar conduct in the future. 83 F.3d at 508.

In *Lowery v. Circuit City Stores*, 158 F.3d 742 (4th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Jan. 5, 1999) (No. 98-972), a combined § 1981 and Title VII action, the court held that punitive damages are an "extraordinary remedy, designed to punish and deter *particularly egregious* conduct." *Id.* at 766 (emphasis added). In *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996), the Court applied a two-tiered standard of proof under the malice and reckless indifference standard.

In *Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627 (7th Cir. 1996), the court applied the same higher hurdle in a sexual harassment suit. In discussing the malice and reckless disregard standard, the Court held: "This is a higher hurdle than merely proving the underlying unlawful discrimination. And having gotten over this additional element of proof, the amount of punitive damages to which a plaintiff is entitled is determined by *the degree of egregiousness* of the underling 'malice or reckless indifference.'" *Id.* at 636 (emphasis added). *See also Tincher v. Wal-Mart*, 118 F.3d 1125, 1132-34 (7th Cir. 1997)

In *Karcher v. Emerson Electric Co.*, 94 F.3d 502 (8th Cir. 1996), the court, in affirming an award of compensatory damages while reversing on punitive damages, applied the malice or reckless indifference standard, as though there was a two-tiered system. The court held, in circumstances more egregious than petitioner's allegations in this case (job qualifications designed to eliminate all women from promotion and subsequent retaliation), that there was insufficient evidence

of "malice or *deliberate* indifference or that its conduct was *outrageous*." *Id.* at 509 (emphasis added).

In *Ngo v. Reno Hilton Resort Corp.*, 140 F.3d 1299 (9th Cir. 1998), *modified* 156 F.3d 988, *petition for cert. filed*, 67 U.S.L.W. 3407 (U.S. Dec. 18, 1998) (No. 98-999), the Ninth Circuit held that defendant's conduct, while negligent "and perhaps even recklessly . . ." did not "evince an *evil motive* or a *conscious and deliberate* disregard" of the employee's Title VII rights. The court reversed the punitive damage award but affirmed the compensatory damage award. *Cf. EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989, 992-94 (9th Cir. 1998).

In *Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995), the Tenth Circuit held that the "imposition of punitive damages in civil rights cases requires "that the discrimination must have been "*malicious, willful, and in gross disregard of [plaintiff's] rights.*" *Id.* at 1263 (emphasis added).

All of the above-cited cases demonstrate the following:

1) The circuit courts have almost uniformly applied a two-tiered standard of liability for an award of punitive damages which is in accord with congressional intent;
2) The circuit courts have formulated the heightened standard in terms that are functionally similar to the "egregious conduct" standard articulated by the court below; and
3) The issue of whether the conduct is sufficiently outrageous or egregious is a question of law for the court to decide.

Accordingly, amicus urges this Court to affirm the lower court's two-tiered system which is in keeping with the intent and structure of the Act.

F. Policy Considerations Support The Congressional Intent to Reserve Punitive Damages To Cases with Egregious Conduct

1. Punitive Damages for Non-egregious Conduct Can Result in Over-deterrence and Quasi-quotas.

It is well-settled that deterrence and punishment are the primary objectives of punitive damages. *See, e.g., BMW v. Gore, supra.* Employers are required to make numerous personnel decisions everyday, such as hirings, promotions, demotions, discipline, layoff/termination, and transfers, to name a few. Almost invariably, such decisions require choices between two or more competing employees or applicants, frequently involving a protected employee.

The adversely affected, protected category employee almost always satisfies the "minimal" criteria to state a *prima facie* claim of discrimination. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993). Employers can, therefore, be hauled into federal court for almost every personnel decision that they make and be forced to justify their decisions. Consider the employer who must layoff one employee among a number of virtually equally qualified minority and non-minority employees. The prospect of incurring punitive damages in multiple lawsuits at a low threshold level of conduct, such as that proposed by the petitioner, will lead many a rational businessperson to consciously or unconsciously lay off the non-minority employee.

Even if the employer articulates a valid reason for laying off the protected employee, the plaintiff can still prevail if he or she demonstrates that the stated reason was a pretext for discrimination. This aspect of the case almost always is submitted to the jury since the ultimate issue to

be resolved is motive. *See, e.g., Ingels v. Thiokol Corp.*, 42 F.3d 616 (10th Cir. 1994). If nothing more is required for a jury to consider in awarding punitive damages, there will be a powerful incentive for employers to make quota-like personnel decisions. This would be particularly true in the "close case." However, this type of voluntary "quota" decisionmaking is not only against public policy,[13] it is illegal and constitutes reverse discrimination, although not generally resulting in a Title VII lawsuit.

Although all discrimination is intolerable, not all discrimination warrants punitive damages. If a plaintiff can obtain punitive damages by establishing pretext, but without any "smoking gun" or showing of egregious conduct on the part of the employer, there can be no deterrent effect in the decisionmaking process through an award of punitive damages. In almost all discrimination cases, unless the decisionmaker is a bigot (in which case there likely are egregious facts warranting punitive damages), the decisionmaker genuinely believes that the personnel decision is justifiable and non-discriminatory.

While that belief may be second-guessed by the jury to the employer's detriment, it must not, absent flagrant or egregious conduct (e.g,, altered personnel records; prior discriminatory conduct by the same supervisor; or other such conduct) give rise to a claim for punitive damages. This is true even if the jury, for whatever reason, believes by the preponderance of the evidence that the employer's rationale for the employment decision was a pretext.[14]

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[13] *See* President Bush's veto message on S. 2106, 136 Cong. Rec. S16418 (1990).

[14] It is also noteworthy that the EEOC has found no probable cause to believe discrimination has occurred in 60% of all charges filed and completely investigated. That startling high

For this reason, allowing for the jury to award punitive damages in every garden variety discrimination case as the petitioner argues would be contrary to public policy because it would lead to over-deterrence and conscious or unconscious quota-based personnel actions. Since this type of personnel action cannot be deterred if made in good faith, the only purpose served by a punitive damage award is to provide an opportunity of a windfall for the plaintiff.

2. Petitioner's Lower Standard for Imposing Punitive Damages Will Lead to Unnecessary Litigation

Petitioner's argument that punitive damages are available in almost every Title VII case also runs counter to the entire Title VII enforcement scheme which encourages and fosters prompt investigation, settlement, conciliation, and resolution of disputes. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 180-81 (1989). The prospect of receiving large punitive damages awards by participating in the litigation lotto provides a disincentive to a complainant to settle the case out of court. Indeed, EEOC statistics appear to lend support for this observation.

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rate was approximately the same in 1991. 11 Employment Discrimination Report (BNA) No. 8, at 278 (Aug. 19, 1998) compiled from EEOC's Charge Data System. In stark contrast, between 1991 and 1997, the rate of probable cause findings has ranged between 2.2% - 3.8% of all processed charges. *Id.* This Court should be reticent in providing a non-expert jury with a liberal opportunity to award punitive damages after the expert EEOC agency has determined that the overwhelming majority of charges lack merit.

upon receipt by complaining employee of certain benefits for an additional 6.6% of charges; and approximately 0.8% of the total resolved by conciliation. Thus, almost 16% of the approximate 64,000 cases of alleged discrimination were resolved by the EEOC's administrative process prior to the implementation of the 1991 Civil Rights Act. *See* 11 Employment Discrimination Report (BNA) No. 8, at 278 (Aug. 19, 1998) compiled from EEOC's Charge Data System. This settlement rate was comparable to the overall settlement rates of 16.8% of Title VII charges for the period between 1987-1990. *See* H.R. Rep. No. 40, Pt. 1, at 74, n.70.

The situation by Fiscal Year 1997, however, stands in stark contrast. In that year, EEOC received 106,312 discrimination charges -- 3,992 (3.8%) were resolved by settlement; 3,635 (3.4%) were resolved by withdrawal with benefits; while 1,041 (1.0%) were successfully conciliated. Thus, in 1997, EEOC resolved only 8% of the total cases, approximately 50% of the rate that existed *before* the passage of the Act. *Id.*

Amicus submits that adopting petitioner's arguments that punitive damages should be available, at the discretion of the jury, in essentially every case, would increase the incentive to litigate rather than settle, thereby frustrating the overall legislative intent to encourage non-litigation resolution of charges of discrimination.

3. Because Existing Economic Sanctions Are a Sufficient Deterrent Against Discrimination, Punitive Damages Should Be Reserved for Egregious Discrimination.

In every claim of discrimination, employers may be liable for backpay, front pay, compensatory damages, including emotional distress and pain and suffering, Plaintiff's attorneys' fees[15] and their own attorneys' fees.[16]

Consequently, notwithstanding Amicus the National Employment Lawyers Association (NELA)'s protestations that there are insufficient economic deterrents to discrimination in the absence of punitive damages (*Br.*, at 11-15), the potential cost of the garden variety discrimination claim is significant. Employers who face potential non-punitive damages costs and legal fees of $200,000 - $300,000 in a wrongful promotion claim involving a small salary differential, will not feel free to

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[15] Plaintiff's attorneys' fees, in individual Title VII claims can be substantial. Indeed, Plaintiff's attorneys in this case sought attorneys' fees and costs in excess of $175,000. *Kolstad*, 912 F. Supp. 13 (D.D.C. 1996). *See also Hennessy v. Penril Datacomm*, 69 F.3d 1344 (7th Cir. 1995) (award of $137,297 in attorneys' fees not abuse of discretion); *Harris v. L & L Wings*, 132 F.3d 978, 984-85 (4th Cir. 1996) ($126,329 in attorneys' fees).

[16] According to a study by the Rand Corporation, defense fees in wrongful discharge litigation averaged $80,000, as of 1988, and was projected to increase 24% annually. H.R. Rep. No. 40, Pt. 1, at 151-52. It is thus reasonable to assume legal fees to defend a discrimination claim now exceed $150,000, with a possible similarly-sized attorneys' fee award for the plaintiff's attorney.

intentionally discriminate simply because of the absence of additional punitive damages. The cost of discrimination to the employer does not need to be increased by a routine award of punitive damages, in the absence of heightened and egregious conduct.[17]

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[17] The cases cited by Amicus NELA to suggest that punitive damages would not be awarded under the court of appeals "egregious" standard, in fact involved egregious or heightened discrimination. NELA Br. at 12-13. Thus, punitive damages would be (and, in fact, were) awarded in many of those cases under the egregious standard. Thus, in *Harris v. L & L Wings, supra*, the Court affirmed punitive damages in the amount of $150,000 to each of two victims of sexual harassment because the conduct was "egregious." Similarly, in *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995), the Court not only affirmed back pay award of $22,320, as reported in NELA's Brief at 13, but also affirmed an additional $37,000 in compensatory damages, $50,000 in punitive damages, and approximately $100,000 in attorneys' fees. This additional $187,000 in damages and fees was conveniently omitted from the NELA's rendition of the case. Where conduct is egregious, punitive damages are recoverable. Where conduct is not egregious, back pay, compensatory damages, front pay, where applicable; and attorneys' fees are recoverable and they can be substantial. Many other cases cited by NELA also included the award of punitive damages, compensatory damages, and/or attorneys' fees, but were not reflected in NELA's case summaries. NELA Brief at 15. *See, e.g., Kimzey v. Wal Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) ($35,000 compensatory; $350,000 punitive after Court reduction); *Quaratino v. Tiffany & Co.*, 129 F.3d 702 (2d Cir. 1997) ($98,000 punitive; $139,000 attorneys' fees) *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996) ($7,325 compensatory; $500,000 punitive reduced to statutory cap).

II. THE SUFFICIENCY OF THE EVIDENCE TO JUSTIFY PUNITIVE DAMAGES IS A QUESTION OF LAW IN THE FIRST INSTANCE

Amicus submits that the sufficiency of the evidence, which may allow for a jury's possible award of punitive damages, is a question of law to be decided by the trial judge, in the first instance, as the court below held. *Kolstad*, 139 F.3d at 965-66. Thus, regardless of what the heightened level of proof is required to sustain a punitive damages award, the district court must have the opportunity to determine whether reasonable jurors could find that a plaintiff has sustained that burden. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (summary judgment applies the same standards as a motion for judgment as a matter of law, pursuant to Fed.R.Civ.P. 50(a)).

As this Court noted in *Anderson*, "The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict - 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'" 477 U.S. at 252.[18]

In *Anderson*, the Court held that whether reasonable jurors could determine that "actual malice had been shown with convincing clarity," the governing legal standard in that case, was a question of law for the Court. That

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[18] Appellate courts review decisions on a motion for judgment as a matter of law *de novo*, using the same standard as the district court. The motion is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed.R.Civ.P. 50(a)(1); *Lam v. Curators of the University of Missouri*, 122 F.3d 654, 656 (8th Cir. 1997).

question in turn is dependent upon "the quality and quantity of evidence required by the governing law. . . ." *Id.* at 254. As the Court held: "It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Id.* at 254-55.

The court of appeals correctly determined that the sufficiency of the evidence presented to support the punitive damage claim was a question of law. This decision is supported by the case law in other Circuits. *See, e.g., Tincher v. Wal-Mart Stores, Inc., supra,* 118 F.3d at 1133-34 (7th Cir. 1997) (court finds evidence insufficient for a reasonable finder of fact to determine reckless disregard for evil motive or intent or egregious conduct, although evidence sufficient to submit issue of liability). *Fitzgerald v. Mountain States Tel. & Tel. Co., supra*, 68 F.3d at 1262 ("Whether sufficient evidence exists to support punitive damages is a question of law reviewed *de novo*."); *Karcher v. Emerson Electric Co., supra*, 94 F.3d at 509 (punitive damage claim should not have been submitted to the jury because insufficient evidence.); *Coleman v. Rahija*, 114 F.3d at 787 (8th Cir. 1997); *Wulf v. City of Wichita,* 883 F.2d 842, 867 (10th Cir. 1989) ("While the trier of fact has the discretion to determine the appropriate amount of punitive damages, the sufficiency of the evidence supporting such an award is a legal question.").

Providing the trial judge with the role of gatekeeper on whether the evidence presented rises to the heightened standard also serves as a deterrent to a jury acting out of passion, partiality, or prejudice, against large anonymous

employers who must make personnel decisions everyday.[19] *See, e.g., Honda Motor Co. v. Oberg*, 512 U.S. 415, 425 (1994). Punitive damages in Title VII cases must be reserved to punish and deter egregious and outrageous conduct.

CONCLUSION

For the above reasons and those stated in the respondent's brief, this Court should affirm the judgment of the *en banc* court below.

Respectfully submitted.

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[19] Amicus Association of Trial Lawyers of America's fear that the judge's role regarding punitive damages will deny a plaintiff a right to trial by jury (ATLA Br. at 19-20), misses the point. Although the amount of punitive damages is reserved to the jury, whether there is sufficient evidence to support any award is a question of law under both Fed.R.Civ.P. 50(a) and 50(d). *See, e.g., Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 329-30 (1967); *cf. Hetzel v. Prince William County*, 523 U.S. 208 (1998).

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No. 98-208

In the Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,
PETITIONER,

v.

AMERICAN DENTAL ASSOCIATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL RETAIL FEDERATION IN SUPPORT OF RESPONDENT

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In the
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**ON WRIT OF CERTIORARI TO
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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF OF *AMICUS CURIAE* NATIONAL RETAIL FEDERATION IN SUPPORT OF RESPONDENT

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Retail Federation (the "NRF") is the world's largest retail trade association, with membership that includes the leading department, specialty, discount, mass merchandise and independent stores, as well as 32 national and 50 state associations.[1] NRF members represent an industry that encom-

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[1] Pursuant to Rule 37.6, the NRF discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its legal counsel make a monetary contribution to the preparation or submission of this brief. Letters of consent by the parties to the filing of this brief are being filed simultaneously herewith.

passes more than 1.4 million U.S. retail establishments, and employs more than 20 million people — about 1 in 5 American workers. NRF's international members operate stores in more than 50 nations.

The NRF and its members have a high level of interest in litigation, such as this matter, raising important legal questions under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq*. The NRF has submitted numerous *amicus* briefs over the past several years in labor and employment cases which have been of interest to its members.[2] The present case raises an important question of statutory interpretation, regarding the standard established in 42 U.S.C. §1981a(b)(1)[3] for

[2] The complete list of labor and employment cases in which briefs *amicus curiae* have been submitted (and accepted) is as follows:

a. *Weis Markets, Inc. t/a Mr. Z's Food Mart and United Food and Commercial Workers Local 72*, Case No. 98-1892 (U.S. Court of Appeals for the Fourth Circuit) (currently pending);

b. *Lewis* v. *KMart Corp.*, Case No. 98-2179 (U.S. Court of Appeals for the Fourth Circuit) (currenly pending);

c. *Lowery* v. *Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998) *petition for cert. filed*, December 14, 1998;

d. *Weis Markets, Inc.*, 325 NLRB No. 162 (1998);

e. *Drexel Co.*, 316 NLRB 1103 (1995);

f. *L'Enfant Plaza Properties*, 316 NLRB 1111 (1995);

g. *Oakland Mall*, 316 NLRB 1160 (1995) *review denied sub nom., United Food and Commercial Workers, Local No. 880* v. *NLRB*, 74 F.3d 292 (D.C.), *cert. denied sub nom., International Brotherhood of Teamsters Local No. 243* v. *NLRB*, 519 U.S. 809 (1996); and

h. *Makro, Inc.*, 316 NLRB 109 (1995) *review denied sub. nom., United Food and Commercial Workers, Local No. 880* v. *NLRB*, 74 F.3d 292 (D.C. Cir.), *cert. denied sub nom., International Brotherhood of Teamsters Local No. 243* v. *NLRB*, 519 U.S. 809 (1996).

[3] This section provides in full:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

allowing juries to consider whether to award punitive damages under Title VII and the ADA. The Court's interpretation of this provision is likely to have a significant effect on the NRF's membership for years to come.

II. SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to clarify the circumstances under which a District Court may allow a jury to consider an award of punitive damages against an employer or other respondent, pursuant to 42 U.S.C. §1981a(b)(1). Appellate courts, including the court below in *Kolstad* v. *American Dental Association*, 139 F.3d 958 (D.C. Cir. 1998), have consistently rejected the interpretation urged by the petitioner, namely "that punitive damages should be available in every case strong enough to get to the jury on simple compensation . . ." *Id.* at 961. Adoption of such a standard would ensure that in every case in which intentional discrimination is found, juries would be deciding whether punitive damages are appropriate. Such a result is contrary to the language and purpose of §1981a(b)(1).

The interpretation pressed on this Court by the petitioner, if adopted in the same or similar form in this Court's opinion, would have numerous consequences adverse to the administration of justice and the effective operation of the businesses owned and operated by the NRF's members. A ruling in favor of the petitioner would provide litigants and their attorneys with strong incentives to bring suit under Title VII and the ADA, regardless of the merits of the underlying claims, due to the potential availability of punitive damages in every case where unlawful discrimination is found. In addition, a ruling which treats punitive damages no differently than other forms of damages will act as a spur to plaintiffs and their attorneys to choose federal over state court, even when punitive damages are available under applicable state law. Retail employers, while continuing to strive to ensure compliance with equal employment opportunity laws, will be unneces-

sarily burdened with increased damages and related costs of litigation, even though the evidence of wrongdoing presented to a jury may be no more than what is presented to establish liability in the most ordinary of cases.

III. ARGUMENT

A. THE DECISIONS OF THE COURTS OF APPEALS, INCLUDING THE COURT BELOW, HAVE PROPERLY REJECTED THE STANDARD URGED BY THE PETITIONER AND *AMICI*.

Under 42 U.S.C. §1981a(a)(1), a complaining party who has established that the "respondent. . .engaged in unlawful intentional discrimination," "may recover compensatory and punitive damages as allowed in subsection (b) of" 1981a.[4] Section 1981a(b)(1) sets forth the rules for recovery of punitive damages. In pertinent part, this section provides for recovery of such damages "if the complaining party demonstrates that the respondent engaged in a discriminatory practice. . .with malice or reckless indifference to the federally protected rights of" the complainant. Thus, the plain terms of §1981a require two separate inquiries, first, on the existence of intentional discrimination, followed by an inquiry under §1981a(b)(1) to determine if sufficient evidence has been presented for the question of punitive damages to be considered by a jury.

The petitioner would impermissibly conflate these inquiries, contrary to the plain intent of Congress. In her brief to this Court (p. 14), the petitioner has argued that the phrase "reckless indifference to the federally protected rights of an aggrieved individual," contained in 42 U.S.C. §1981a(b)(1), means that "punitive damages are. . .authorized where a

[4] 42 U.S.C. §1981a(a)(2) contains a parallel provision for the recovery of compensatory and punitive damages under the ADA and 29 U.S.C. §794a(a)(1).

[5] "The term 'discriminatory practice' means the" intentional discrimination made unlawful by Title VII. See 42 U.S.C. §1981a(d)(2).

defendant knew or should reasonably have realized that its conduct was probably unlawful." In discussing this standard, petitioner strains to define any circumstances under which intentional discrimination would not suffice to justify sending the question of punitive damages to the jury. (*See* Brief of Petitioner, pp. 32-34). While asserting that the standards in Title VII are sufficiently unclear that "any intentional act of discrimination would [not] necessarily involve reckless indifference" (*see id.*), the three limited situations specifically identified by petitioner as those "in which intentional action may or may not be 'discrimination,'" (*see* Brief of Petitioner, pp. 33-34), offer no comfort to the NRF's membership. It is apparent that petitioner's ultimate aim is to establish a rule that in every case in which liability is established, juries must pass on the propriety and amount of punitive damages.[6]

Several appellate courts in recent years, including the court below in *Kolstad* v. *American Dental Association*, 139 F.3d 958 (D.C. Cir. 1998), have addressed the same arguments advanced by the petitioner, and found them wanting. Courts have consistently rejected the argument that a finding of intentional discrimination under Title VII is sufficient for the jury to consider the propriety of punitive damages. Rather, as articulated most recently in *Ngo* v. *Reno Hilton Resort Corp.*, 140 F.3d 1299 (9th Cir.), *amended, reh'g en banc denied*, 156 F.3d 988 (9th Cir. 1998), six circuits "require plaintiffs seeking punitive damages under Title VII to make a showing beyond the level of intentional discrimination required for compensatory damages." *See* 156 F.3d 988 (*amending* 140 F.3d at 1304). The reasoning of these opinions, outlined below, should inform the Court's consideration of the question presented.

[6] One of the *amici curiae* submitting briefs on behalf of the petitioner unequivocally requests the adoption of such a rule. *See* Brief of the National Employment Lawyers Association, at 4 (endorsing rule "that no evidence beyond that which was submitted on liability need be offered to establish entitlement to punitive damages. . .").

In rejecting an interpretation such as that urged by the petitioner, the court in *Emmel* v. *Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 636 (7th Cir. 1996), began its analysis by recognizing that, under Title VII, a prevailing plaintiff need only prove "that intentional unlawful discrimination was more likely than not the reason underlying the adverse employment decision in question." The standard established by Congress in §1981a(b)(1) for submission to the jury of the question of punitive damages, is obviously not the same as that for deciding whether intentional discrimination occurred. Indeed, this standard "is a higher hurdle than merely proving the underlying unlawful discrimination." *Emmel* v. *Coca-Cola Bottling Co. of Chicago*, 95 F.3d at 636.

Similarly in *Harris* v. *L&L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997), the court called it "well established that exemplary damages are not an element of recovery in every case involving an intentional tort." (citing *McKinnon* v. *Kwong Wah Restaurant*, 83 F.3d 498, 508-509 (1st Cir. 1996)). The *Harris* court reasoned that "the text and background of the Civil Rights Act of 1991, which authorizes punitive damages, emphasize that this extraordinary remedy is not to be awarded automatically in every successful Title VII suit." *Harris* v. *L&L Wings, Inc.*, 132 F.3d at 982. *Accord*, *Ngo* v. *Reno Hilton Resort Corp.*, 140 F.3d at 1304 ("we interpret the language of section 1981a to require plaintiffs seeking punitive damages to make a showing beyond the threshold level of intent required for compensatory liability.").

By making punitive damages potentially available in every case, the rule urged by the petitioner is contrary to the limited scope which such damages are intended to have under §1981a(b)(1). Section 1981a(b)(1)' "was enacted against a backdrop of prevailing doctrine that punitive damages are to be awarded only in cases where the twin aims of punishment and deterrence are paramount." *Harris* v. *L&L Wings, Inc.*, 132 F.3d at 983. The court added that "even when they are available, punitive damages remain wholly within the jury's discretion and 'are never awarded as of right, no matter how

egregious the defendant's conduct.'" *Id.* (quoting *Smith* v. *Wade*, 461 U.S. 30, 52 (1983)). "There is no vested right to punitive damages on the part of the plaintiff and where allowed, they are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future." *McKinnon* v. *Kwong Wah Restaurant*, 83 F.3d at 498. Simply put, such damages are "not favored in the law and are allowed only with caution and within normal limits." *Id.*

The adoption of a rule allowing the jury to consider the propriety and amount of punitive damages, virtually every time that a finding of intentional discrimination is made, will elevate punitive damages to a status not intended by Congress in enacting the Civil Rights Act of 1991. The amount of punitive damages which can be assessed is already capped, pursuant to 42 U.S.C. §1981a(b)(3). In enacting 1981a(b)(1), Congress further established a specific standard defining the circumstances under which punitive damages "may" be recovered. *See* 42 U.S.C. 1981a(b)(1). This standard requires a preliminary finding of intentional discrimination. *See* 42 U.S.C. 1981a(a)(1). Eliminating the clear distinctions between the requirements for finding intentional discrimination and considering the propriety of punitive damages not only rewrites the 1991 amendments to Title VII, but also makes punitive damages as routine an element of recovery as back pay. This result cannot have been intended by the Congress that crafted §1981a(a) and (b).

B. SIGNIFICANT CONCERNS EXIST REGARDING THE RESULT URGED BY PETITIONER AND *AMICI*.

According to the petitioner and her *amici*, the result they seek to achieve will have no adverse effects on the federal courts or American business. In its brief *amicus curiae* (p. 17), the National Employment Lawyers Association belittled any potential argument by the respondent regarding the "specter

of 'runaway' and 'excessive' jury awards" resulting from the adoption of petitioner's standard for assessing punitive damages. According to that organization, Congress rejected this argument in 1991, when it amended Title VII and the ADA to provide for punitive damages. "Congress' decision to allow Title VII and ADA plaintiffs access to a jury of their peers evidences a policy choice that juries, rather than judges, should render moral judgment on a particular employer's conduct." (*Id.*)

The Association's argument misconstrues the issue before the Court. There is no dispute that punitive damages can be awarded under Title VII and the ADA, and that juries, rather than judges, decide on their propriety and amount (albeit, it is expected, without passing "moral judgment" on any party). The question to be decided presently by this Court is how §1981a(b)(1) should be interpreted, and in particular, what amount of evidence must a plaintiff put forward before the jury will be allowed to consider the issue of punitive damages. Failing to require a heightened standard of proof for punitive damages, as adopted by the court below, and the other appellate courts discussed above, will have several practical, negative consequences. Such consequences cannot have been intended by Congress in enacting the 1991 Civil Rights Act, and can best be avoided by adopting the respondent's analysis of §1981a(b)(1).

First, a ruling adopting the petitioner's position will provide employees and their attorneys with strong incentives to bring suit under Title VII and/or the ADA, regardless of the merits of the underlying case:

> By simply having to prove intentional discrimination to sustain an award of punitive damages, plaintiffs have a strong incentive to sue. Thus, many cases that may not normally merit punitive awards will be brought to provide a potential windfall and 'cashing in' for plaintiffs.

Note, *Court Disregards Legislative History of the Civil Rights Act of 1991 and Bucks Current Trends Regarding Punitive Damages: Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1996) (*"Note"* or *"Kolstad Note"*), 23 *Dayton L. Rev.* 643, 656-657 (Spring, 1998). It is not unreasonable or farfetched to conclude that providing such incentives to employees and their attorneys will only congest the federal court docket even further.

Second, a ruling in favor of the petitioner, and failure to adopt a heightened standard for allowing punitive damages to be considered, will create incentives for plaintiffs and their attorneys to choose federal over state courts for their discrimination claims. As stated in the *Kolstad Note*, a "loose standard" for punitive damages "will lead to forum shopping by Title VII plaintiffs. Plaintiffs will look to sue in a forum, which will provide the highest potential for monetary gain." *Note*, 23 *Dayton L. Rev.* at 657. If petitioner's standard is adopted, equating a finding of liability with the quantum of evidence required to consider a punitive damage award, the forum with the potential for such gain is very likely to be the federal court. Even in states without caps on punitive damages, plaintiffs and their attorneys, at least in some cases, will be inclined to choose the federal over the state forum, if they harbor any reservations about their ability to support a claim for punitive damages by adducing evidence beyond the evidence required for a finding of intentional discrimination.

Yet another negative effect likely to result from the adoption of petitioner's position is that businesses will be unnecessarily burdened. These burdens are likely to be significant, and to take many forms.

First, there is likely to be an increase in the number of discrimination charges and suits which employers face. In the wake of the enactment of the 1991 Civil Rights Act, there has already been a surge in the number of employment-related civil rights suits. *See* Barrier, *"Lawsuits Gone Wild," Nation's Business* (U.S. Chamber of Commerce, February 1998). The

adoption of a novel and unsupportable standard for submitting punitive damage issues to juries will only exacerbate this trend, increasing legal and other expenses for American business.

Moreover, all American businesses, including but not limited to retail employers, will face increased costs as a result of a decision such as that sought by petitioner. Most obviously, judgments adverse to employers are likely to be larger. In addition, the costs of settlement will increase. Most cases, of course, settle, without a state or federal trial ever being held. If attorneys for plaintiffs are provided with the weapon which they are seeking to extract from this litigation, plaintiffs will be able to exert even greater leverage in negotiating with employers. The most likely outcome is that employers will capitulate to plaintiffs' demands at higher and higher prices, lest they be saddled with a punitive damages award which, in petitioner's universe, will come fast on the heels of a finding of intentional discrimination.

Such results serve no one's interests. The NRF's members are proud of their efforts, including training and other preventive programs, both to comply with all anti-discrimination laws, including Title VII and the ADA, and to prevent charges from even being filed in the first place. These efforts will be undermined and subverted if litigants and their attorneys are provided aid and comfort by an opinion creating the constant threats of higher punitive damages and settlement costs.

The adoption of petitioner's position is likely to produce additional adverse consequences. For one, the line between compensatory and punitive damages will be obliterated. Under 42 U.S.C. §1981a(a)(1) and (b), the consideration of compensatory damages is not subject to the "malice or . . . reckless indifference" standard set forth in §1981a(b)(1); rather, all that is required for such damages to be considered is that there be a finding of intentional discrimination. *See* 42 U.S.C. §1981a(a)(1), (b). Interpreting §1981a in the manner urged by the petitioner, i.e., lowering the standard

for punitive damages such that the evidence required is the same for a finding of intentional discrimination, will mean that compensatory and punitive damages will be awarded under the same standards. Such a result is plainly contrary to Congress's intent, as evidenced by the language of 42 U.S.C.§1981a.

The elimination of this distinction will only exacerbate the already present danger that juries will use punitive damages as a proxy for compensatory damages. In the NRF's experience, juries are inclined to assess punitive damages to compensate for their inability to award compensatory damages, when no evidence of underlying emotional harm has been presented. By changing the rules by which §1981a has been interpreted, this trend can only worsen, and may be beyond the ability of trial and appellate courts to rectify. For example, if a plaintiff presents little or no evidence of emotional harm, a jury should not assess such damages, or, alternatively, any award can be readily attacked either after trial or on appeal, based on the absence of the necessary proofs. However, if a lowered standard for punitive damages is applied, a jury's decision to award such damages, as compensation for its inability to award emotional distress damages, could not readily be challenged, since the elimination of any kind of heightened standard of proof for punitive damages, may make it impossible for a district or appellate court to sort out the propriety of such an award.

A final negative consequence of adopting petitioner's position is that, in the words of the *Kolstad* note, it "is at odds with current public policy." *Note*, 23 *Dayton L. Rev.* at 657. The appendix to the dissenting opinion of Justice Ginsburg in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 614-619 (1996), compiled numerous measures either enacted or proposed by state legislatures "to curtail awards of punitive damages." Expanding the circumstances under which punitive damages can be recovered in federal court runs counter to this strong trend in the states. Such a result, moreover, is at odds with the intent of Congress in capping punitive

damages, and subjecting them to a heightened standard of proof which is over and above the proof required for a finding of intentional discrimination.

IV. CONCLUSION

For the reasons stated in this brief, *amicus curiae* National Retail Federation respectfully requests that this Court affirm the opinion of the lower court.

Respectfully submitted,

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AMERICAN DENTAL ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI
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BRIEF OF AMICUS CURIAE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM") submits this brief in support of Respondent American Dental Association.[1/] Beginning 1999 with 113,000 professional members,

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[1/] Pursuant to Supreme Court Rule 37.3(a), *amicus* files this brief with the consent of the parties. Evidence of consent is filed concurrently with this brief. *Amicus* discloses pursuant to

from all 50 states and 80 other countries, SHRM is the leading voice of the human resource profession. SHRM's mission is to lead, represent, guide, and inform human resource practitioners and others interested in human resource issues regarding matters of critical and strategic importance to the workplace.

SHRM's members, on a daily basis, apply the myriad employment laws governing the workplace. However this Court ultimately decides the issue presented here, SHRM members, probably more than any other association of professionals, will be responsible for assessing its impact and designing and implementing whatever human resource programs and policies are appropriate as a result.

SHRM presented testimony before the Senate during the legislative debates on the Civil Rights Act of 1991. SHRM regularly provides the Equal Employment Opportunity Commission with formal comment on regulatory issues as well as informal advice and assistance when requested.

SHRM welcomes the opportunity to file this brief to assist the Court's understanding of the enormous practical effect its decision will have on the workplace. SHRM hopes this Court will adopt a rule of law that will encourage employers to initiate and maintain positive and fair employment practices, furthering the purposes underlying Title VII of the Civil Rights Act of 1964.

SUMMARY OF ARGUMENT

The decision of the U.S. Court of Appeals for the District of Columbia Circuit should be affirmed. The imposition of punitive

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Supreme Court Rule 37.6 that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

damages should be limited to cases in which the employer must be *punished* for egregious conduct. As the court of appeals correctly recognized, a finding that an employment decision more likely than not was based on an illegal criterion, without more, is an insufficient basis for imposing a substantial fine upon an employer. As Respondent argues, the court of appeals's view is consistent with the punitive damages statute, Congress's intent, and decisions of other courts.

SHRM urges this Court to fashion a rule regarding punitive damages consistent with its recent, practical decisions in Title VII cases. Last Term, this Court recognized that the statutory policy of Title VII is best served if employers are recognized for their efforts to discharge their obligations under the statute. In the *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* decisions, the Court created a "safe harbor" from liability in sexual harassment claims for employers that act responsibly to fulfill their obligations under Title VII.

This Court should extend to this case the approach to Title VII taken in *Faragher* and *Ellerth*, by providing employers a safe harbor from liability for punitive damages. When an employer demonstrates its reasonable and good faith commitment to preventing discrimination, and to remedying discrimination should it occur, the employer should not be held liable for punitive damages as a matter of law, even if a jury concludes a particular decision was based on an illegal criterion. Such a rule is consistent with the letter and spirit of the law, as an employer that takes such measures cannot be charged with "egregious conduct," "malice," or "reckless indifference" to federally protected rights. This rule also will encourage employers to prevent employment discrimination and foster early, informal dispute resolution without the need for the courts' involvement.

ARGUMENT

A. FOR THE REASONS STATED BY RESPONDENT, THE COURT OF APPEALS'S STANDARD FOR IMPOSING PUNITIVE DAMAGES UNDER 42 U.S.C. § 1981a IS CONSISTENT WITH THE STATUTORY LANGUAGE AND CONGRESS'S STATUTORY INTENT

SHRM will not burden this Court with duplicative analysis already supplied by Respondent and other *amici* supporting affirmance. SHRM strongly believes Congress did not intend to subject employers to liability for punitive damages in every case where intentional discrimination is established. This result would obtain if Petitioner's position were adopted.

This Court's jurisprudence is clear and consistent: punitive damages are "private fines levied by civil juries to *punish reprehensible conduct* and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (emphasis added); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages are "intended to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from *similar extreme conduct*") (emphasis added). Respondent's argument is consistent with this Court's sound views regarding the extraordinary remedy of punitive damages. Therefore, SHRM endorses the arguments advanced by Respondent in favor of affirming the court of appeals.

B. THE LOW THRESHOLD FOR IMPOSITION OF PUNITIVE DAMAGES ADVOCATED BY PETITIONER AND HER *AMICI* WILL PROMOTE THE FILING OF MERITLESS OR AVOIDABLE EMPLOYMENT DISCRIMINATION LITIGATION IN FEDERAL COURT

1. The Number of Employment Discrimination Claims Filed in Federal Court and Before the EEOC Has Increased Dramatically Since Congress Passed 42 U.S.C. § 1981a As Part of the Civil Rights Act of 1991

Members of the House and Senators who were critical of the compensatory and punitive damages provisions in the Civil Rights Act of 1991 [2/] feared Title VII of the Civil Rights Act of 1964 [3/] would be turned into a general workplace tort law, resulting in a "bonanza" for attorneys. *See, e.g.*, 137 Cong. Rec. H9536 (daily ed. Nov. 7, 1991) (statement of Rep. Sensenbrenner). Their nightmares unfortunately have come true.

Employment discrimination claims are the most common type of case filed in federal courts, with the exception of criminal and prisoner-related cases. *See Administrative Office of the Courts, Judicial Business of the U.S. Courts*, tbl. C-2A (1998). The number of employment discrimination claims filed in federal court has *exploded* since the passage of CRA 1991. Thus, for the 12-month period ending September 30, 1993, there were 12,962 employment discrimination cases filed. For the same period ending in 1997, the

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[2/] Civil Rights Act of 1991, Pub. L. No. 102-1066, 105 Stat. 1072 (codified as amended in scattered sections of 42 U.S.C.) (hereinafter "CRA 1991").

[3/] Civil Rights Act of 1964, tit. VII, 78 Stat. 253, *as amended*, 42 U.S.C. § 2000e *et seq.* (1994 & Supp. II 1996) (hereinafter "Title VII").

number had soared to 23,796. *See id.*

There is no sign that the number of employment discrimination filings will be abated in the foreseeable future. The Equal Employment Opportunity Commission reports the number of administrative charges filed under Title VII increased from 49,584 in fiscal year 1991 to 58,615 in fiscal year 1997. In addition, charges filed under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (1994), the vast majority of which allege disparate treatment rather than failure to accommodate, increased from 15,274 in fiscal year 1993 to 18,108 in fiscal year 1997. *See U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1991 Through FY 1997* (visited Jan. 10, 1999) <http://www.eeoc.gov/stats/>. These filings are a harbinger of a continued increase in employment discrimination lawsuits. [4]

If, as urged by Petitioner and her *amici*, this Court holds punitive damages may be assessed in a jury's discretion upon *any* intentional [5] violation of Title VII, the number of filings is sure to continue increasing. The resulting increase in litigation not only will further burden the federal courts' dockets, but also the countless small and medium-sized employers that are subject to Title VII jurisdiction. [6]

Put simply, employers of limited resources, facing exposure to punitive damages, will pay money out of fear to settle meritless

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[4] The filing of an administrative complaint or "charge" with the EEOC is a condition precedent to filing a civil action under Title VII. *See* 42 U.S.C.§ 2000e-5(f)(1) (1994); *United Air Lines v. Evans*, 431 U.S. 553, 555 n.4 (1977).

[5] *See infra*, n.7.

[6] Employers of more than fifteen employees are covered "employers" under Title VII. *See* 42 U.S.C. § 2000e(b) (1994).

cases. As Senator Dale Bumpers, a Democrat who negotiated the *passage* of CRA 1991, explained candidly:

> I confess that as a country lawyer, I filed lawsuits that did not have an awful lot of merit but that I knew had settlement value. Any honest trial lawyer worth his salt will tell you he has done that. . . . And I can only tell you that as a small businessman . . . a lawsuit againsts [sic] me for $50,000 in punitive damages would have made me go ballistic because I did not have $50,000 nor any place to lay my hands on such a sum.

137 Cong. Rec. S15479 (daily ed. Oct. 20, 1991) (statement of Sen. Bumpers).

Senator Bumpers supported passage of CRA 1991 because he understood plaintiffs would have to sustain "*a heavy burden*" to obtain punitive damages. *Id.* If Petitioner's argument carries the day, this Court will have considerably lightened the plaintiffs' burden by increasing their leverage.

2. The Low Standard Courts Apply to Deny Employers' Motions for Summary Judgment in Title VII Cases Provides a Further Basis for Affirming the Court of Appeals

In tandem with the minimal standard several of the circuit courts apply to motions for summary judgment, the rule advocated by Petitioner will result in substantial hardship to employers. As discussed below, employees easily can evade summary judgment regarding both liability *and* punitive damages even in the *absence* of proof of unlawful intent to discriminate in violation of Title VII.

The plaintiff in a Title VII lawsuit ultimately must prove intentional discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509

U.S. 502, 507 (1993). [7] At present, however, it is possible for an employee to defeat an employer's motion for summary judgment *without* raising a triable issue of fact regarding intent to unlawfully discriminate. Rather, to defeat the motion, the plaintiff simply must establish: (1) he or she was part of a protected class (2) there was an adverse employment decision (3) he or she was otherwise qualified (4) the position was filled by a person not in a protected class (the prima facie case of discrimination), plus (5) the employer's articulated legitimate reason for making the decision was unworthy of belief. [8]

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[7] It should be noted that establishing "intentional" discrimination itself does not impose a heavy burden upon plaintiffs. Employment decisions such as termination of employment or failure to hire inherently are "intentional." To prove intentional *discrimination* the employee must show a discriminatory motive merely was a "motivating factor" behind the employment decision, "even though other factors motivated the decision." 42 U.S.C. § 2000e-2(m) (1994). Thus, unlawful motivation need not be the *only* reason for the decision, nor must the employee prove the decision would not have occurred "but for" the protected classification. *See id.*

[8] *See Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1289-90 (D.C. Cir. 1998); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159 (10th Cir.), *cert. denied*, ___U.S.___, 119 S. Ct. 617 (1998); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert. denied*, ___U.S.___, 118 S. Ct. 685 (1998); *Sheridan v. E.I. DuPont de Nemour & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996) (*en banc*), *cert. denied*, ___U.S.___, 117 S. Ct. 2532 (1997); *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 682 n.5 (7th Cir. 1996). *But see Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (*en banc*), *cert. denied*, ___U.S.___, 118 S. Ct. 1341 (1998); *Rhodes v. Guiberson Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994).

Put another way, if an employer does not provide the full and complete reason for employment action taken against an employee or applicant, its motion for summary judgment likely will be denied. Thus, a plaintiff may defeat a motion for summary judgment even in the absence of proof that the *real* reason for the decision was intentional unlawful discrimination.

In a perfect world, it certainly could be argued that employers always should provide applicants and employees with complete reasons for their employment decisions. But an employer may not have been completely candid with an employee or applicant for a host of reasons *having nothing to do with Title VII*, *e.g.*, to avoid hurting the applicant's or employee's feelings or to avoid an unpleasant conflict.[9] Yet, under Petitioner's construction of 42 U.S.C § 1981a (1994), the employer that tries to avoid, for example, arguments over the employee's performance not only will lose a motion for summary judgment on liability for unlawful discrimination, but also the jury will be permitted to consider awarding *punitive damages*.

The instant case presents an example of the above scenario. The district court stated:

> While the evidence may have been sufficient to have convinced the jury that Kolstad's candidacy for the position [at issue] was treated cavalierly, and [the male] given a preference from the start, it is insufficient to prove to the Court's satisfaction that her sex or his more likely than not had anything to do with her rejection.

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[9] "Managers, like most U.S. workers, are extremely averse to conflict and will avoid addressing it until it reaches the point of a crisis." Stephanie Reynolds, *Managing Conflict Through a Team Intervention and Training Strategy*, Employee Rel. Today, Winter 1998, at 57.

Kolstad v. American Dental Ass'n, 912 F. Supp. 13, 15 (D.D.C. 1996), *aff'd in part and rev'd in part*, 108 F.3d 1431 (D.C. Cir. 1997), *rev'd*, 139 F.3d 958 (D.C. Cir. 1998) (*en banc*), *cert. granted*, ___U.S.___, 119 S. Ct. 401 (1998). The district court would have granted a motion for a directed verdict had it not considered itself bound by *Barbous v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (permitting the jury to infer unlawful discrimination solely from the rejection of an employer's legitimate business reason as pretextual).

Thus, Petitioner seeks punitive damages for what the district court perceived amounted to, at most, arbitrary (but lawful) conduct, rather than unlawful discrimination. As a practical matter, the "reckless indifference" standard advocated by Petitioner imposes on plaintiffs no burden other than proving an employment decision was based on intentional discrimination.

As the dissent below candidly recognized, Title VII and its "prohibition against discrimination are well known to employers." *Kolstad v. American Dental Ass'n*, 139 F.3d 958, 973 (D.C. Cir. 1998) (*en banc*) (Tatel, J., dissenting). The EEOC recognizes, "[i]n many cases, the evidence that establishes liability will also establish malice or reckless indifference." (Brief of *Amicus Curiae* EEOC at 10 n.5.)

If punitive damages liability may attach to every decision that has negative consequences for an employee in a protected class, sound employer decisionmaking will be significantly inhibited. *Every* employee is in a classification protected by Title VII.[10] As stated, *every* promotion, layoff, and termination decision is an

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[10] For example, all parties and *amici* likely would stipulate every employee is of the male or female sex and, therefore, is protected under Title VII from discrimination based on sex. *See Oncale v. Sundowner Offshore Svcs., Inc.*,523 U.S. 75, 118 S. Ct. 998, 1002-03 (1998).

intentional decision that can give rise to liability for punitive damages.[11] The mere fact that the offending decision is made by a person generally aware of laws against discrimination should not be sufficient to provide plaintiff lawyers with the ultimate litigation weapon: *settlement leverage* in the form of this argument: "You never know what a jury will do with the punitive damages claim." As stated, a jury most likely will never consider the merits of the dispute, as employers will be bullied into settlement of all but the most frivolous claims.

C. EMPLOYERS ACTING REASONABLY AND IN GOOD FAITH TO PREVENT AND REMEDY DISCRIMINATION WITHOUT COURT INTERVENTION SHOULD BE INSULATED FROM LIABILITY FOR PUNITIVE DAMAGES

Last Term, this Court observed in *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S. Ct. 2275 (1998):

> It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations [of Title VII] and give credit here to employers who make reasonable efforts to discharge their duty.

118 S. Ct. at 2292. *See also Burlington Indus. v. Ellerth*, ___ U.S.___, 118 S. Ct. 2257, 2270 (1998).

SHRM urges this Court to hold in the instant case that employers may avoid liability for punitive damages if they take reasonable steps to prevent discrimination and provide avenues for

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[11] *See supra*, n.7.

redress of perceived wrongs. [12] Such employers plainly do not act with "malice" or with "reckless indifference" to federally protected rights, even if a jury concludes that a particular decision was based on a criterion illegal under Title VII.

A "safe harbor" in which employers may take refuge from punitive damages liability is consistent with Title VII and 42 U.S.C. § 1981a, regardless of whether this Court affirms or reverses the decision of the court below. Giving employers credit for their good faith efforts to comply with the law, by reducing the penalties that may be assessed, also is consistent with other federal laws punishing employers and corporations.

1. The "Safe Harbor" Is Consistent with Title VII and 42 U.S.C. § 1981a

Title VII is a "statute meant to influence primary conduct." *Faragher*, ___U.S. at___, 118 S. Ct. at 2292. It is intended to "avoid harm," and *not* "to provide redress" to plaintiffs. *Id. See also Ellerth*, ___U.S. at___, 118 S. Ct. at 2270 (noting Congress's intention "to promote conciliation rather than litigation in the Title VII context"). SHRM's proposal is consistent with Title VII's goal to avoid harm. The best way to avoid discrimination is to prevent

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[12] While *Faragher* was a case involving sexual harassment under Title VII, sexual harassment is "but a form of employment discrimination." *Ellerth*, ___ U.S. at ___, 118 S. Ct. at 2275 (Thomas, J., dissenting). *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-66 (1986). There is no reason to treat harassment based on sex differently from other forms of prohibited discrimination in the terms and conditions of employment.

its occurrence. The safe harbor rewards employers that take preventive measures. [13]

The safe harbor proposal also is consistent with 42 U.S.C. § 1981a. An employer with a policy against discrimination and proof that it is enforced is *diligently respectful* of Title VII, not "recklessly indifferent," much less guilty of "malice" or "egregious conduct." The dissent below agrees with this point of view:

> An employer could thus argue that even though it had been found liable for the discriminatory acts of an employee and ordered to pay compensatory damages to the victim, it should not have to pay punitive damages, because it had undertaken good faith efforts to comply with Title VII—for example, by hiring staff and managers sensitive to Title VII responsibilities, by requiring effective EEO training, or by developing and using objective hiring and promotion standards—thereby demonstrating that it never acted in reckless disregard of federally protected rights.

Kolstad, 139 F.3d at 974 (Tatel, J., dissenting).

Petitioner and some of her *amici* (including the EEOC) recognize the employer's good faith is relevant to the punitive damages inquiry. Arguing this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 130 (1985), supplies the correct analysis of the punitive damages standard, Petitioner states the employer in *Thurston* was not guilty of "reckless disregard"

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[13] While, as Petitioner and her *amici* argue, the prospect of punitive damages also may provide an incentive for employers to take the same preventive measures, they also provide incentive for employees and their attorneys to pursue frivolous claims.

because it "had consulted with counsel about its legal obligations and, at worst, had simply overlooked the challenged aspect of its practices." (Pet. Brief at 19.) The employer's good faith conduct—obtaining legal advice—insulated it from liability.

Interpreting 42 U.S.C. § 1981a, the EEOC stated the following issues are relevant to whether punitive damages should be imposed in Title VII cases: whether the conduct suggests an official policy of discrimination as opposed to the work of a renegade supervisor; evidence that the employer tolerated or condoned the discriminatory conduct over time; and the employer's conduct after it was informed of discrimination. *See U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991* 53-54 (1992). The converse also should be true. If the evidence shows a supervisor's isolated decision rather than an official policy is responsible for discrimination, or if the evidence shows the employer does not have a history of tolerating or condoning discrimination, or if the employer responds promptly and meaningfully to complaints of misconduct, the employer should not be held liable for punitive damages—even if the supervisor's intentional employment decision ultimately is found to be discriminatory.

The brief of *amici curiae* Lawyers' Committee for Civil Rights Under Law, *et al.* is consistent with this approach. It states "a good faith effort to abide by Title VII does not reflect the reckless indifference necessary for an award of punitive damages." (Brief of *Amici Curiae* Lawyers' Committee for Civil Rights Under Law *et al.* at 25.)

While SHRM disagrees with the low standard for liability advocated by Petitioner and her *amici*, SHRM certainly acknowledges the force of Congress's command: employers who "persist in intentional discrimination in the face of well-established federal prohibitions" (Brief of *Amicus Curiae* EEOC at 31) are deserving of punishment in the form of punitive damages. SHRM

firmly believes, however, that, consistent with this command, employers that recognize well-established law and make sincere, good faith efforts to *avoid* intentional discrimination should be given "credit," *see Faragher*, 118 S. Ct. at 2293, for their efforts. This "credit" should take the form of insulation from punitive damages, in the unfortunate event intentional discrimination occurs despite employers' reasonable efforts to prevent it. Such a rule will induce employers to prevent discrimination and to remedy complaints before they arrive on the federal dockets, thereby furthering the goals of Title VII.

In contrast, the rule proposed by Petitioner and her *amici* is inconsistent with *Faragher*'s interpretation of the policy underlying Title VII. For Petitioner would impose punitive damages liability against the employer based on an individual decisionmaker's state of mind alone, without considering the employer's efforts to prevent or cure discrimination and whether the plaintiff availed himself or herself of the employer's anti-discrimination policies and procedures.

2. A "Safe Harbor" Is Consistent with Other Laws Imposing Penalties on Employers and Companies

Punitive damages are analogous to criminal penalties. A safe harbor against imposition of punitive damages is consistent with federal criminal law. The Federal Sentencing Guidelines for organizations [14] provides corporations with "credit" for good faith efforts to comply with our nation's varied and complex criminal laws. The sentencing rules expressly provide for a substantial reduction in a fine if the organization has an effective "compliance

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[14] Federal Sentencing Guidelines Manual § 8 *et seq.* (1998).

program." [15] In addition, the Department of Justice will consider a corporation's compliance program's effectiveness as one of the relevant factors in deciding whether to prosecute a corporation. [16]

An employer's good faith conduct also is a defense to financial liability under other employment laws. For example, the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (1994), provides for substantial monetary penalties against employers that fail to adhere to safety standards. *See id.* § 666. Just as Title VII requires employers to prevent discrimination, the OSHA statute

> requires that an employer do everything reasonable in its power to ensure that its personnel do not violate safety standards. But if an employer lives up to that billing and an employee nonetheless fails to use proper equipment or otherwise ignores firmly established safety measures, it seems unfair to hold the employer liable. To address this dilemma . . . the courts have recognized the availability of the [unpreventable employee misconduct] defense. . . . [¶]To reach safe harbor, an employer must demonstrate that it (1) established a work rule to prevent the reckless behavior and/or unsafe condition from occurring, (2) adequately communicated the rule to its employees, (3) took steps to discover incidents of noncompliance and (4) effectively enforced the rule whenever employees transgressed it.

P. Gioioso & Sons, Inc. v. Secretary of Labor, 115 F.3d 100, 109 (1st Cir. 1997). *See generally* 1 *R. Ben Hogan, et al., Occupational Safety and Health Act*, § 4.03[6] at 4-73 *et seq.* (1998).

In sum, a "safe harbor" protecting employers in Title VII cases is completely consistent with other laws providing for imposition of monetary penalties. It ensures a blameless entity is not punished unjustly and promotes salutary conduct designed to further the purposes of the legislation at issue. On the other hand, wrongdoers that cannot satisfy the safe harbor requirements are exposed to such exemplary or other damages as may be appropriate.

3. Employers May Choose from a Wide Variety of Resources and Options for Making Reasonable Efforts to Discharge Their Obligations Under Title VII to Prevent Employment Discrimination

Faragher provides employers with some general guidance regarding how to avoid liability for unlawful harassment under Title VII. This Court held employers, to avail themselves of the affirmative defense to certain sexual harassment claims, must show:

> (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
> (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, ___ U.S. at ___, 118 S. Ct. at 2293. These criteria may be applied to claims for punitive damages.

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[15] *Id.* § 8C2.5(f). An effective compliance program includes, *inter alia*, development of compliance standards and effective communication thereof, reasonable steps to assure compliance with the standards, and consistent enforcement of the standards and efforts to prevent future occurrences if violations occur. *See generally* Edward S. Rapier, Jr., *Corporations: The Federal Sentencing Guidelines for Organizations: How They Affect A Civil Practice*, 46 La. B.J., Jun. 1998, at 20.

[16] *See* Rapier, *supra*, at 22.

Employers may obtain from many sources assistance with their efforts to "exercise reasonable care" in preventing illegal discrimination. For example, the EEOC recently issued a comprehensive report on employer "best practices" in an effort to "achieve equal employment opportunity in the workplace." [17]

The report [18] is the product of an extensive survey of private sector employers. The report defined a "best practice" as one that

- complies with the law;
- promotes equal employment opportunity;
- manifests management commitment and accountability;
- ensures management and employee communication;
- promotes noteworthy results; and
- does not cause or result in unfairness.

See Best Practices at 25.

Applying these parameters, the report provides numerous examples of "best practices" for a variety of human resource responsibilities, including recruitment and hiring, promotion and career advancement, terms and conditions of employment, termination of employment, alternative dispute resolution, and management commitment and accountability. *See Best Practices* at 6.

It would unduly burden this Court to list or discuss at length all of the practices compiled by the EEOC. Taking the report as a

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[17] Letter from Hon. Reginald Jones, Commissioner, Equal Employment Opportunity Commission to Society for Human Resource Management (Apr. 7, 1997) (on file with SHRM).

[18] *Equal Employment Opportunity Commission, Task Force Report on "Best" Equal Employment Opportunity Policies, Programs, and Practices in the Private Sector* (1998) (hereinafter "*Best Practices*").

whole, an employer's commitment to equal opportunity and therefore to compliance with Title VII may be evaluated by considering whether the employer has undertaken one or more actions such as:

- Promulgated a zero tolerance policy against discrimination that has been appropriately communicated to employees;

- Provided information to supervisors to help them become knowledgeable about equal employment opportunity issues and concerns;

- Adopted an effective complaint resolution system to address issues as they arise;

- Investigated complaints promptly, fairly, and objectively; and, where appropriate,

- Corrected mistakes that have occurred.

The above is not meant to be an exhaustive list, nor should all employers be required to implement every element of the programs discussed. Indeed, employers differ widely in their financial capabilities to take every conceivable step imaginable to prevent discrimination from occurring. Rather than the mechanical application of a checklist of factors, the critical issue should be whether the employer, based on all the facts and circumstances, has shown its commitment to a discrimination-free workplace. Thus, other employer conduct demonstrating the employer is undeserving of punitive damages could include any of the following:

- Supervisors evaluated in part on their human resource skills, including their commitment to equal employment opportunity;

- The employer's history of resolving complaints internally within the company and the action taken against those who

violate equal employment opportunity standards; and

- Management's consultation with human resource professionals or, as in *Thurston*, employment counsel, before making the challenged employment decision.

The salutary effect of these efforts is beyond cavil. An employer taking such comprehensive measures to comply with Title VII logically could not be called "recklessly indifferent" to Title VII or malicious, even if the employer "intentionally" made a challenged employment decision.

Ironically, the employer's efforts to comply with Title VII actually could *assist* a plaintiff seeking punitive damages, if Petitioner's argument carries the day. Thus, Petitioner argues, punitive damages are "authorized where a defendant knew or should reasonably have realized that its conduct was probably unlawful." (Pet. Brief at 14 (footnotes omitted).) (*See also* Brief of *Amicus Curiae* Association of Trial Lawyers of America at 2-3 (stating "punitive damages should be available in cases where the defendant knew or should have known that its conduct was unlawful".) The employer's dissemination of an equal opportunity policy and provision of anti-discrimination training surely would *foreclose* the employer's argument that the decisionmaker was ignorant of the law. In sum, this Court should not countenance Petitioner's construction of 42 U.S.C. § 1981a, as it would lead to this unfair and absurd result.

CONCLUSION

For the foregoing reasons, *amicus curiae* Society for Human Resource Management respectfully requests this Court to affirm the

decision of the U.S. Court of Appeals for the District of Columbia Circuit.

January 18, 1999

Respectfully submitted,

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APPENDIX

42 U.S.C. § 2000e(b)

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .

42 U.S.C. § 2000e-2(m)

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(f)

(1) * * * If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .

Federal Sentencing Commission Guidelines Manual

§ 8C2.5. CULPABILITY SCORE

(a) Start with 5 points and apply subsections (b) through (g) below.

• • •

(f) Effective Program to Prevent and Detect Violations of Law

If the offense occurred despite an effective program to prevent and detect violations of law, subtract 3 points. . . .

Occupational Safety and Health Act

29 U.S.C. § 666

(a) Willful or repeated violation

Any employer who willfully or repeatedly violates the requirements of section 654 of this title, any standard, rule, or order promulgated pursuant to section 655 of this title, or regulations prescribed pursuant to this chapter, may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.

(b) Citation for serious violation

Any employer who has received a citation for a serious violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, shall be assessed a civil penalty of up to $7,000 for each such violation.

(c) Citation for violation determined not serious

Any employer who has received a citation for a violation of the requirements of section 654 of this title, of any standard, rule, or order promulgated pursuant to section 655 of this title, or of regulations prescribed pursuant to this chapter, and such violation is specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $7,000 for each such violation.

(d) Failure to correct violation

Any employer who fails to correct a violation for which a citation has been issued under section 658(a) of this title within the period permitted for its correction (which period shall not begin to run until the date of the final order of the Commission in the case of any review proceeding under section 659 of this title initiated by the employer in good faith and not solely for delay or avoidance of penalties), may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues.

(e) Willful violation causing death to employee

Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.

(f) Giving advance notice of inspection

Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.

(g) False statements, representations or certification

Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(h) Omitted

(i) Violation of posting requirements

Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $7,000 for each violation.

(j) Authority of Commission to assess civil penalties

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Supreme Court, U.S.
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No. 98-208

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*.[1] Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges affirmance of the decision of the court below and thus sup-

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[1] Counsel for the *amicus* authored the brief in its entirety. No person other than the *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief.

ports the position of the respondent, American Dental Association.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound programs to eliminate employment discrimination. Its membership now includes more than 300 of the nation's largest private sector companies. They all are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (Title VII), and other laws prohibiting employment discrimination.

Collectively, EEAC's 300-plus member companies make and implement millions of employment decisions each year, including hires, promotions, transfers, terminations, and other employment actions. EEAC members are firmly committed to the principle of equal employment opportunity. They devote extensive resources to training, awareness, and compliance programs designed to ensure that all their employment actions are carried out in accordance with Title VII and other applicable legal requirements. Nevertheless, each employment transaction is a potential subject of one or more charges and/or lawsuits alleging discrimination. Consequently, EEAC members have an ongoing, substantial interest in how the courts interpret the provisions of Title VII, including the provisions for punitive damages added to that law by the Civil Rights Act of 1991. 42 U.S.C. §§ 1981a(a) and 1981a(b)(1).

Because of its members' interests in these issues, EEAC has filed *amicus curiae* briefs with this Court in a number of cases presenting questions concerning the remedies available under equal employment opportunity laws,[2] punitive damages in general,[3] and the meaning of the 1991 amendments to Title VII.[4] Because of its long-standing interest in and familiarity with these issues, EEAC is well situated to brief the Court on the potential implications its decision in this case could have for employers in general.

STATEMENT OF THE CASE

The petitioner, Carole Kolstad, was a staff lawyer for the respondent, American Dental Association. When the second-ranking person in the Association's Washington office announced his retirement, Kolstad expressed interest in the position, but the Association awarded it to a male staff lawyer instead. Kolstad subsequently sued, alleging that the Association had denied her the promotion because of her sex. At trial, she introduced evidence allegedly indicating that the Association's managers never seriously considered her for the position, because they had "preselected" the male lawyer and had altered the content of the position to fit his qualifications. A jury found that the Association had discriminated against Kolstad in violation of Title VII.

The trial court concluded that the evidence was sufficient to support the jury's finding of discrimina-

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[2] *E.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) (meaning of "willful" standard for liquidated damages under Age Discrimination in Employment Act); *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) (same).

[3] *E.g., Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (unconstitutionality of state law prohibiting judicial review of jury awards of punitive damages).

[4] *E.g., Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (non-retroactivity of 1991 amendments).

tion, but not to support an award of punitive damages. Therefore, the trial court awarded Kolstad back pay but did not allow the jury to consider an award of punitive damages. Both parties appealed to the D.C. Circuit.

The appeal was decided initially by a three-judge panel, which held that the 1991 amendments to Title VII gave juries discretion to award punitive damages in almost any case in which they find intentional discrimination, except perhaps where the evidence shows that the defendant employer acted under an honest but mistaken view of what the law requires.

On rehearing, a majority of the court of appeals *en banc* concluded that when Congress amended Title VII in 1991, it "did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII." (Pet. App. 5a.) Rather, the court noted, Congress expressly limited such awards to cases in which a victim of intentional discrimination shows that the unlawful conduct was committed "with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). By using these words, the court reasoned, "Congress meant to reserve punitive damages for particularly egregious violations of Title VII." (Pet. App. at 6a.)

Applying this standard to the case before it, the court of appeals concluded that the evidence did not show "the kind of egregious discriminatory conduct necessary for the imposition of punitive damages." (*Id.* at 20a.) Accordingly, it held that trial court was correct in not allowing the jury to consider such an award.

A minority of the *en banc* court dissented, arguing that by using the phrase "reckless indifference," Congress meant to authorize punitive damages whenever an employer was aware of its obligations under Title VII but engaged in unlawful disparate treatment of employees. The dissenters would recognize exceptions only where the employer was unaware of the law's requirements or "did everything it could to comply" but was unsuccessful. (*Id.* at 29a.)

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that evidence establishing a routine case of unlawful disparate treatment under Title VII, without more, is not sufficient to warrant submitting the question of punitive damages to a jury. The language, structure, and history of the 1991 amendments all support the conclusion that Congress meant to limit the imposition of punitive damages to cases involving a degree of culpability greater than is required to support other Title VII remedies.

The interpretation of the statutory phrase "with malice or with reckless indifference" urged by the dissenters below, and advocated here by the petitioner and her *amici*, would have the anomalous effect of treating employers more leniently when they have managed to remain ignorant of their obligations under Title VII than when they have taken steps to familiarize themselves with the law's requirements. Under the dissenters' reasoning, evidence that an employer had "instituted Title VII compliance programs" or sought advice from "equal employment opportunity consultants and attorneys" could be used against the employer to foreclose any argument that the trial judge should not submit the issue of punitive

damages to the jury. (*Id.* at 28a.) Congress could not have intended such a result when it limited the availability of punitive damages under Title VII to cases involving malice or reckless indifference, for such a reading of the 1991 amendments would conflict with Congress' overarching purpose of encouraging voluntary compliance with Title VII.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT EVIDENCE ESTABLISHING A ROUTINE CASE OF UNLAWFUL DISPARATE TREATMENT, WITHOUT MORE, IS NOT SUFFICIENT TO WARRANT SUBMISSION OF THE QUESTION OF PUNITIVE DAMAGES TO A JURY

A. The Language, Structure, and History of the 1991 Amendments All Support the Conclusion That Congress Meant to Limit the Imposition of Punitive Damages to Cases Involving a Degree of Culpability Greater Than Is Required to Support Other Title VII Remedies

At issue in this case is the meaning of the 1991 amendments to Title VII in which Congress provided that victims of unlawful intentional discrimination may be awarded punitive damages, in addition to any other Title VII remedies to which they may be entitled, if they can show that an employer acted "with malice or with reckless indifference" to their federally protected rights.[5] The court of appeals' opinion sets

[5] 42 U.S.C. Section 1981a(a)(1) provides that in Title VII cases involving unlawful intentional discrimination (*i.e., not* practices that are unlawful because of "disparate impact"), complaining parties under certain circumstances may be awarded compensatory and punitive damages "in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. § 2000e-5(g)]."

42 U.S.C. Section 1981a(b)(1), in turn, limits awards of punitive damages in such cases to instances in which "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

42 U.S.C. Section 1981a(b)(3) caps the total amount of compensatory and punitive damages that a complaining party may be awarded under Section 1981a at from $50,000 to $300,000, depending on how many employees the employer has.

forth a detailed analysis of the language, structure, and history of those amendments, as well as the relevant precedents from this Court and other circuit courts. (Pet. App. 5a-20a.) That analysis demonstrates convincingly that, in conditioning awards of punitive damages upon a showing of "malice" or "reckless indifference," Congress meant to limit such awards to cases involving a significantly greater degree of culpability than is involved in the ordinary case of unlawful disparate treatment.

We need not reiterate in this *amicus* brief the court of appeals' detailed analysis of the 1991 amendments to demonstrate the correctness of its conclusions. We merely highlight a few of its central points, which we believe to be particularly compelling. First, as the court noted, the statutory provisions in question establish a "two-tiered" scheme that sets forth, in separate sections, "one standard for basic liability, another for the exceptional remedy of punitive liability." (Pet. App. 5a.) The use of this basic, two-tiered structure compels the conclusion that Congress intended that juries would consider punitive damages only in cases where a plaintiff has presented "something more"

than just the minimum evidence needed to show intentional discrimination. (*Id.*) Thus, insofar as the dissenters below (*id.* at 24a), and the petitioner and her *amici* here, have suggested that plaintiffs who seek punitive damages need not present any evidence beyond that required to establish liability for unlawful disparate treatment, they are plainly wrong. For, although Congress unquestionably recognized all acts of intentional discrimination as reprehensible, the structure and wording of the amendments make clear that it intended to reserve the remedy of punitive damages for cases involving an extraordinary degree of culpability on the part of an employer.

Second, as the court of appeals went on to observe, in order to avoid flattening, and thereby effectively obliterating, the two-tiered scheme Congress adopted, it is essential that courts treat the second tier—*i.e.*, the "something more" that a plaintiff must show to warrant a jury's consideration of punitive damages—as significantly higher than that of the initial tier, at which liability is established. *See* (Pet. App. 6a.) The second tier would be essentially meaningless if it could be satisfied by so little as a showing that the employer knew that the law prohibits intentional disparate treatment of employees because of race, color, religion, sex, or national origin. Faithfulness to congressional intent precludes this Court from giving section 1981a(b)(1) an interpertation that would render its effect so negligible.

Third, the legislative history and judicial precedents cited by the court of appeals provide ample support for its conclusion that Congress intended to reserve punitive damages for cases involving particularly serious forms of intentional discrimination. Indeed, as the court noted, the legislators who enacted

the 1991 amendments, in describing what they intended the phrase "with malice or with reckless indifference" to mean, repeatedly equated it with the term "egregious" and referred to court decisions using that same term. *See* 137 Cong. Rec. S 15473 (Oct. 30, 1991) (Interp. Memo of Sen. Dole *et al.*) (punitive damages to be available only in "extraordinarily egregious cases"); 137 Cong. Rec. S 15483 Oct. 30, 1991) (Sponsors' Interp. Memo) (expressing understanding that punitive damages were awardable only "in egregious cases" under 42 U.S.C. § 1981); H.R. Rep. No. 102-40, pt. 1, at 74 (citing *inter alia Beauford v. Sisters of Mercy-Province of Detroit*, 816 F.2d 484, 489 (6th Cir. 1987), in which Sixth Circuit observed that punitive damages in civil rights actions had "generally have been limited to cases involving egregious conduct or a showing of willfulness or malice on the part of the defendant.").

Fourth, the court of appeals' conclusion that Congress meant the phrase "with malice or with reckless indifference" to denote only egregious forms of discrimination also finds ample support in decisions of other circuits, issued both before and since the effective date of the 1991 amendments to Title VII. (Pet. App. 8a-9a.) In addition to the *Beauford* case cited in the House Report referenced above, three other circuit decisions already on the books at the time of the amendments supported the view that punitive damages under 42 U.S.C. Section 1981 were limited to cases involving egregious misconduct. *See Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489 (4th Cir. 1988) (evidence of intentional discrimination, although "reprehensible and abhorrent," was inadequate to warrant punitive damages under Section 1981); *Jackson v. Pool Mortg. Co.*, 868 F.2d 1178,

1182 (10th Cir. 1989) (trial court, having found unlawful discrimination under Section 1981, properly rejected punitive damages in absence of showing that defendant exhibited "personal animosity and malice" toward plaintiff), *cert. denied*, 488 U.S. 996 (1988); *Walters v. Atlanta*, 803 F.2d 1135, 1147 (11th Cir. 1986) (defendants, although responsible for racial discrimination against plantiff, did not act with "requisite ill will or callous disregard of [plaintiff's] federally guaranteed rights" to warrant award of punitive damages under Section 1981). Decisions of several circuits issued under Title VII since the effective date of the 1991 amendments are to the same effect. *E.g.*, *Turic v. Holland Hospitality*, 85 F.3d 1211, 1216 (6th Cir. 1996) (employer's violations of Title VII, although characterized by court as "duplicitous" and indicative of "lack of empathy" toward plaintiff, "did not rise to the level to support a punitive damages award under the Civil Rights Act of 1991); *Lindale v. Tokheim Corp.*, 145 F.3d 953, 958 (7th Cir. 1998) ("In . . . the garden-variety disparate treatment case with no circumstances of aggravation such as the involvement of higher management or a pattern of flouting the law . . . punitive damages may not be awarded.").

Finally, the court of appeals clearly was correct in recognizing that this Court's decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), do not undercut its determination that Congress intended to limit punitive damages under Title VII to cases involving egregious forms of intentional discrimination. As the court of appeals pointed out, those decisions involve the standard for liquidated damages under the Age Discrimination in Employment Act

(ADEA), 29 U.S.C. § 621 *et seq.*, not the standard for punitive damages under Title VII. The standard for liquidated damages under the ADEA is whether the employer's violation of the Act was "willful," not whether it was committed with "malice" or "reckless indifference." *See* 29 U.S.C. § 626(b). Moreover, liquidated damages under the ADEA are a fixed amount equal to any back pay awarded to the plaintiff, not a variable amount to be determined by a jury. Accordingly, this Court's holdings that a court may assess liquidated damages under the ADEA if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA," *Thurston*, 469 U.S. at 624, 625; *Biggins*, 507 U.S. at 1709, clearly do not control the meaning of the standard for punitive damages under Title VII. Just because this Court equated the ADEA term "willful" with "reckless disregard," it does not follow that that term has the same meaning as "reckless indifference" under Title VII.

B. In Limiting Punitive Damages to Cases Involving "Malice or Reckless Indifference," Congress Cannot Have Intended That Evidence That an Employer Has Instituted Title VII Compliance Programs or Sought Advice From EEO Consultants or Attorneys Could Be Used Against the Employer as Support for Submitting Punitive Damages Claims to a Jury

Sound public policy does not support a standard requiring automatic submission of punitive damages claims to the jury in every Title VII case in which there is evidence that the employer knew the basic requirements of the law. In this regard, *amicus* EEAC is particularly concerned about the assertion in the dissenting opinion below that:

> Considering that Congress passed the Civil Rights Act over three decades ago, that the statute and

> its prohibition against discrimination are well known to employers, that many companies have instituted Title VII compliance programs, and that an industry of equal employment opportunity consultants and attorneys is readily available to employers in need of assistance, a jury could reasonably conclude that an employer nevertheless refusing to hire or promote a woman because of sex is worthy of punishment.

(Pet. App. 28a.) The clear—and, to us, chilling—implication of this statement is that evidence that an employer has instituted Title VII compliance programs, or has sought advice from equal employment opportunity (EEO) consultants or lawyers regarding its obligations under Title VII, could be used as support for allowing a jury to assess punitive damages against the employer.

The apparent premise of the dissenters' argument is that if an employer has made efforts to familiarize itself with Title VII's requirements, then any violation of those requirements by the employer can be inferred to have been committed "with malice or with reckless indifference" to the law's requirements. In practical terms, such reasoning would mean that most large corporations, such as EEAC's members, would be subject to punitive damages in virtually every case of unlawful disparate treatment. For most such companies do, indeed, maintain active EEO compliance programs and make frequent use of consultants and attorneys to keep them abreast of EEO-law developments. Most also provide regular, ongoing training to ensure that their managerial, supervisory, and in appropriate instances even non-supervisory personnel, are aware of Title VII and other employment-related laws.

The dissenters' arguments would twist Section 1981a(b)(1) into a prescription for penalizing employers who have taken such affirmative steps to familiarize their personnel with Title VII's provisions, while dealing more leniently with those who have managed to remain ignorant of the law and what it requires. But that cannot have been Congress' intent. For one of the overarching aims of Title VII is to encourage employers to cooperate and comply voluntarily with the law's requirements. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974). Clearly, knowledge of those requirements is a prerequisite to such cooperation and voluntary compliance.

Congress' desire that employers become knowledgeable about the statute's requirements is reflected in Section 705(j) of Title VII. That section specifically authorizes and directs the Equal Employment Opportunity Commission (EEOC) to provide education, technical assistance, and training to employers and others regarding Title VII and other laws and regulations enforced by the Commission. *See* 42 U.S.C. § 2000e-4(j).[6] Thus, it would be anomalous, to say the least, if the law were construed in such a way as to subject employers to penalties if they have taken advantage of opportunities to educate themselves and their employees about the law's requirements.

Congress sought to remove any disincentive employers might have to utilize opportunities for assistance and training by the EEOC by expressly provid-

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[6] Section 705(k) provides for a revolving fund, known as the EEOC Education, Technical Assistance, and Training Revolving Fund, to pay the costs of these efforts. 42 U.S.C. § 2000e-4(k).

ing, in Section 705(j)(2), that "[a]n employer . . . shall not be excused from compliance with the requirements of [Title VII] because of any failure to receive technical assistance under this subsection." 42 U.S.C. § 2000e-4(j)(2). The reasoning of the dissenters below, however, would create a disincentive to employers to become knowledgeable about the law. It would suggest to employers that they might be better off not getting assistance and training from the EEOC or from private EEO consultants or attorneys. For, under the dissenters' reasoning, the employer who remained ignorant of the law might be in a better position to resist imposition of punitive damages in the event the employer ever were found to have engaged in some act of unlawful disparate treatment.

These predictable consequences of the dissenters' reasoning are so unpalatable as to make it clear that Congress could not have intended the phrase "reckless indifference" to encompass every act of unlawful disparate treatment committed by an employer who knows the basic requirements of Title VII. Had Congress wanted to make punitive damages awardable in all such cases, it could have made that intention clear. It could, for example, have stated directly that employers would be subject to punitive damages if they committed intentional discrimination with *knowledge* of the federally protected rights of an aggrieved individual. But instead, Congress chose the more limiting phrase "with reckless indifference" to such rights.

"Reckless indifference" connotes a degree of culpability that is not necessarily present in every case in which a defendant knows of the law's basic requirements but still breaches one of them. The word "reckless" reinforces "indifference" and suggests that the character of the violation must be of such a severe,

unusual, or extreme nature as to support an inference that the defendant acted with a conscious and deliberate intent to violate the law, or with a particularly rash or wanton state of mind. The majority of the court of appeals, sitting *en banc*, captured the essence of this meaning in its holding that punitive damages may be imposed in a Title VII case only on a showing of "egregious conduct." We believe this holding accurately reflects the intent of the legislation, supports its overriding goals, and furthers sound public policy.

CONCLUSION

For the reasons stated above, *amicus curiae* EEAC urges this Court to affirm the decision of the court of appeals.

Respectfully submitted,

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No. 98-208

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AMERICAN DENTAL ASSOCIATION

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF *AMICUS CURIAE* FOR THE RUTHERFORD INSTITUTE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutherford Institute hereby respectfully moves the Honorable Court for leave to file the following brief *amicus curiae* in this case. The consent of counsel for the Respondents has been obtained. The consent of counsel for the Petitioners has been requested and refused.

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated

with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including recent gender discrimination cases *Burlington Industries, Inc. v. Ellerth*, Sup.Ct. No. 97-569 (October Term 1997) and *Davis v. Monroe County*, Sup.Ct. No. 97-843 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred and ninety cases nationally in various trial and appellate courts, including numerous employment discrimination actions brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* The Institute has published educational materials and taught continuing legal education classes in this area as well.[1]

The Rutherford Institute is submitting a brief *amicus curiae* in support of neither party, insofar as it does not believe this Court should adopt the standard of liability enunciated by

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[1] John W. Whitehead, Founder and President of the Institute, has published several dozen books and articles on constitutional and civil rights issues, *e.g.*, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992), and *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

either the Petitioner or the Respondent. Instead, the Institute's brief urges the Court to adopt the standard first established by the Dissent in the Court of Appeals.

In light of the important issues being raised in this case, the Institute respectfully requests that its arguments be heard.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

I. What level of discriminatory treatment is necessary to trigger the punitive damages provisions of the 1991 Civil Rights Act, 42 U.S.C. §1981a(b)(1)?

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[2]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including recent gender discrimination cases *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Davis v. Monroe County*, Sup.Ct. No. 97-843 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred and ninety cases nationally in various trial and appellate courts, including numerous employment discrimination actions brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e *et seq.* The Institute has published educational materials and taught continuing legal education classes in this area as well.[3]

[2] *Amicus curiae* The Rutherford Institute files this brief upon leave of Court. Counsel for The Rutherford Institute authored this brief in its entirety, with able research assistance from Heather Price (*J.D.* 1999, Pepperdine Law School.) No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

This Court, in hearing the instant case, has the opportunity to settle a significant dispute among the federal circuits as to what standard is to be applied to discriminatory conduct in determining whether to send the question of punitive damages to the jury in a civil rights case. This question is one of the most critical to arise out of the 1991 amendments to the Civil Rights Act of 1964, 42 U.S.C. §2000e. In this brief, The Rutherford Institute seeks to demonstrate that the standard of punitive liability enunciated by the *en banc* Circuit Court dissent[4] is most in accord with the legislative intent evidenced by the ordinary understanding of the words of the statute, the legislative history of the statute, and the structure of employer liability under Title VII of the 1964 Civil Rights Act.

The 1991 Civil Rights Act provides for an award of punitive damages in cases of "a discriminatory practice or

[3] John W. Whitehead, Founder and President of the Institute, has published several dozen books and articles on constitutional and civil rights issues, *e.g.*, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992), and *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

[4] *Kolstad v. American Dental Association*, 139 F.3d 958, 970-79 (D.C. Cir. 1998) (Dissenting opinion by Tatel, C.J.).

discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. §1981a(b)(1). The Circuit Court majority held that this language necessitated a level of conduct toward the aggrieved party that was "egregious". Under the language of §1981a(b)(1), such a definition may include "malice," but it would exclude most shades of "reckless indifference," thereby ignoring a significant element of the statutory standard. Further, the *en banc* Circuit Court majority sought to apply the definitions and analytical framework of criminal law to a private civil action. In so doing, the court ignored the canon that remedial statutes are to be construed liberally. *See* House Report No. 102-40(I) §209 at 87. Finally, the majority's egregiousness requirement is at odds with the structure of liability set out in Title VII, which imputes liability to employers for disparate treatment and for certain types of sexual harassment regardless of the employer's actual knowledge of an employee's wrongful conduct. Only a standard which imparts compensatory damages liability to employers, but permits an award of punitive damages only where the agency relationship between the employer and the offending employee is sufficiently unattenuated, permits §1981a and Title VII to cohere in a logical and workable fashion. Such a standard was articulated in the Circuit Court's dissenting opinion, which should be adopted by this Court.

III. ARGUMENT

A. THE SUPREME COURT SHOULD DECLINE TO ADOPT THE STANDARD ENUNCIATED BY THE *EN BANC* CIRCUIT COURT MAJORITY AS CONTRARY TO THE LANGUAGE AND INTENT OF THE 1991 CIVIL RIGHTS ACT (42 U.S.C. §1981a(b)(2))

1. The Language of the Act is Clear, and Specifies a Standard for Punitive Damages Well Below the *En Banc* Circuit Court Majority's "Egregious" Standard.

In passing the bill that was to become 42 U.S.C. 1981a(b)(2) into law, Congress employed terminology that required a showing of discriminatory practices with "malice or reckless indifference to the federally protected rights of an aggrieved individual." Although the term "egregious" and its import were then extant in federal statutes and case law, *e.g.*, *Smith v. Wade*, 461 U.S. 30 (1983), and Congress was acutely aware of the case law interpreting damages provisions in civil rights laws while considering enactment of §1981a, *see* House Report No. 102-40(I) at 64, 65, Congress declined to use the term to define the level of misconduct required to impose punitive damages under the Act. Insofar as 42 U.S.C. §1981a is one of the only civil rights statutes to expressly provide for punitive damages and to define the standards for the award of such damages, it was improper for the Circuit Court to view the claims arising under this act through the same interpretive lens that was used to construe punitive damages provisions under the civil rights laws in prior cases. As the dissent in the Court of Appeals observed, the "reckless indifference" standard used in the statute is unambiguous and may not be ignored:

> [b]ecause this court's duty is to"give effect, if possible, to every clause and word of [the] statute," . . . we may not ignore the reckless indifference standard, but must interpret it as written by Congress.

Kolstad, 139 F.3d at 973, quoting *Bennett v. Spear*, 117 S. Ct. 1154, 1166 (1997). *See National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 938-40 (1998).

Unfortunately, the Circuit Court's application of an "egregiousness" standard does exactly that.

In this case, clear instruction is given by the statute itself as to the meaning and availability of punitive damages for violations of §1981a. *See* 42 U.S.C. §1981a (b)(1). A canon of statutory construction holds that, in borrowing terms of art, Congress presumably adopts also the ideas attached to each word and its meaning, unless otherwise instructed. *See Molzof v. United States*, 502 U.S. 301, 307 (1992), *quoting Morissette v. United States*, 342 U.S. 246, 263 (1952). An examination of the ordinary meanings of the terms "malice" and "reckless indifference" demonstrates that the meaning of the words Congress chose to convey the quantum of sanctionable conduct required to allow a jury to determine punitive damages is significantly different from the meaning of the term "egregious" adopted by the Circuit Court majority.

As a requirement to sustain an award of punitive damages, "malice" is a wrongful act done intentionally without just cause or excuse. *Malix v. Apex Intern. Alloys Inc.*, 762 F.2d 77, 80 (10th Cir. 1985). Simply put, malice may be one component of egregiousness but does not in itself imply the full range of evils encompassed by the latter term. *See, e.g., BMW v. Gore*, 517 U.S. 559, 568 (1996). Somewhat lower on the continuum of intent, but higher than negligence, "reckless" is defined as

> Careless, heedless, inattentive; indifferent to consequences.... Conduct must be such as to evince disregard of, or indifference to, consequences, although no harm was intended.

Black's Law Dictionary (6th ed., West Publishing 1990) at 1270. To be "indifferent" is to be "impartial" or "disinterested." *Black's Law Dictionary, supra,* at 773. The phrase "reckless indifference" therefore suggests a knowing state of disregard for the rights of others, a significantly less blameworthy state of culpability on the part of a defendant even than maliciousness.

Suggesting that a jury must find punitive damages only for "egregious" behavior rather than behavior exhibiting malice or reckless indifference can serve only to unduly restrict the range of meaning intended by the statute. "Egregious" is commonly defined as "conspicuously bad or offensive", synonymous with "flagrant," meaning "conspicuously bad, offensive, or reprehensible." *American Heritage Dictionary* (3d ed., Houghton Mifflin 1992) at 589, 689. This Court has consistently interpreted the term in a similar fashion. *See, e.g., County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998) and *BMW v. Gore*, 517 U.S. 559 (1996). For example, in *Sacramento v. Lewis*, the Court in last year's term reviewed the "egregiousness" standard for Fourteenth Amendment violations pursued under 42 U.S.C. §1983. The Court reiterated that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense,'" hence subject to damages liability. *Lewis*, 118 S. Ct. at 1716, quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992). The Court distinguished "egregious" conduct, which it equated to the standard "shocking to the conscience," as a higher standard than common law notions of heightened tort liability:

> It should not be surprising that the constitutional concept of conscience-shocking duplicates no traditional category of common-law fault, but rather

> points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm.

Lewis, 118 S. Ct. at 1717. In so doing, the Court expressed its view that the "egregious" standard exceeds the common law tort standards employed by Section 1981a of "malice" and "reckless indifference." To impose this higher standard, then, would certainly frustrate the clearly expressed intent of Congress.[5]

2. The Circuit Court Majority's View is Inconsistent With the Legislative History of the Civil Rights Act of 1991

The Circuit Court majority relied heavily on its interpretation of the legislative history of the 1991 Civil Rights Act. There is much within this same legislative history

[5] The Circuit Court relies on the canon of construction *noscitur a sociis*, 'a thing is known by its friends', to suggest that the words malice and reckless indifference have the same meaning as the traditional understanding of punitive damages. *Kolstad*, 139 F.3d at 965, n.4. There is, however, another canon of statutory construction that requires that all the words of a statute be given effect. While the former is a linguistic canon, the latter is a systemic canon, that is, it must be followed if each branch of our government system is to retain its Constitutionalpowers. To allow a court to ignore conspicuous terms of a statute that clearly modify the meaning of another term in the statute is to permit federal courts a level of independence that may lead to confusion and incoherency among courts and practitioners. *See generally* Llewellyn, Karl, *The Common Law Tradition: Citing Appeals*, Little Brown (1960) at 522-528.

to suggest that the Circuit Court dissent's position is more consistent with the view of Congress.[6] Both the report of the House Education and Labor Committee (No. 102-40(I) at 87-88) and the House Judiciary Committee (No. 102-40(II) at 34) make clear that the bill was intended as a remedial statute, and as such should be given a broad construction by the courts in applying it to cases of intentional discrimination. *Id.*

The Circuit Court majority places particular emphasis on the House Report, which suggests that a plaintiff "must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages." House Report No. 40(I) at 72. However, the same House Report in the subsequent paragraph notes that it is the jury that shall in every case make the determination of the appropriate award of punitive damages and the judge shall serve as a check in reducing awards that are clearly inappropriate or insupportable. House Report No. 102-40(I) at 72 ("...juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff

[6] The divining of legislative intent through legislative history, while a somewhat biased and unreliable source of statutory meaning, is a starting point for the Court in determining the scope of application of the statute. The problems and dangers incumbent with the use of legislative history to reach judicial decisions are well known and legion. In this case, committee reports are not always read by the members of Congress voting on the bill and are never voted on by Congress nor presented to the President, thereby arguably violating the non-delegation principle and usable only in limited circumstances to confirm understandings of the terms of a statute. *See, e.g.*, John F. Manning, *Textualism as a Non-Delegation Doctrine*, 97 Colum. L. Rev. 673 (1997), and Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 So. Cal. L. Rev. 845 (1992).

adequately and to deter future repetition of the prohibited conduct;" "Judges serve as an additional check: they can and do reduce awards which are disproportionate to the defendant's discriminatory conduct or the plaintiff's resulting loss.") While Congress also implemented a series of limitations on punitive damage's awards in §1981a cases, 42 U.S.C. §1981a(b)(3), the statute further requires that "the court shall not inform the jury of the limitations described in subsection (b)(3) of this section." §1981a(c)(2). This strongly suggests that Congress intended the jury to be responsible for awarding punitive and compensatory damages in Title VII cases subject to post-verdict controls of the court to correct an errant jury verdict. The judge in a Title VII case has no more authority to replace the jury as a finder of fact than does a judge in any other case.

This Court has frequently made clear that no formulaic approach may be applied in assessing the appropriate level of punitive damages.[7] The Respondent's reading of the statute would do just that. Under its analysis, behavior which is intentional but not so egregious that it generates large compensatory damages would virtually never give rise to

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[7] "'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable [level of punitive damages] and the constitutionally unacceptable that would fit every case.' *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993), quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *accord BMW v. Gore*, 517 U.S. at 582-83; *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1718-19 (1998) ("Rules of due process are not . . . subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking.")

punitive damages. However, accomplishing the manifold purposes of the 1991 Act to give incentives to obey the civil rights laws and to eradicate discriminatory behavior in the workplace may require the award of punitive damages in cases of intentional, but not egregious, discrimination. Congress had already determined that this possibility was acceptable when it passed the Act into law using the language of mere intent.

3. The Circuit Court Majority's Standard of Egregiousness Also Conflicts With the Supreme Court's Prior Readings of Similar Punitive Damages and Civil Rights Caselaw.

The purpose expressed in the legislative history of §1981a was to bring damage awards available to victims of gender and religious discrimination into line with those in cases of intentional race discrimination under §1981a. Being aware of this history and with this purpose, the language gives a clear expression to the standards upon which punitive damage awards under §1981a are to be based and clearly rejects the use of an egregious behavior standard as was used in some of the case law on punitive damage awards, requiring instead a malice or reckless indifference standard. It would be erroneous for this Court to accept the Circuit Court majority's approach that these express terms are simply defined according to a prior common law interpretation of the standards for the application of punitive damages in civil rights cases. The Court must strive to define these terms consistent with their usage in other areas of law.

Both the Circuit Court's majority and dissent rely on cases discussing punitive damages in other areas of civil rights law, primarily *Smith v. Wade*, 461 U.S. 30 (1983), a 42

U.S.C. §1983 case, and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), an Age Discrimination in Employment Act case. Based on its reading of *Smith*, the Circuit Court majority would only allow punitive damages to reach the jury "where, for example, the evidence shows that the defendant engaged in a pervasive pattern of discriminatory acts, or manifested genuine spite or malevolence, or otherwise evinced a 'criminal indifference to civil obligations.'" *Kolstad*, 139 F.3d at 965 *quoting Smith*, 461 U.S. at 41. The majority declined to rely on *Hazen Paper* because it dealt with a statute that differed in its damages provisions from §1981a. *Kolstad*, 139 F.3d at 966-67. On such grounds, the court should also have declined to rely upon *Smith*, since *Smith* was brought under 42 U.S.C. §1983, and §1983 has no punitive damages provision at all, leaving the court to decide the standards in which punitive damages can reach the jury on a common law basis.

In a statute the use of a term such as "punitive damages" imputes to that term the whole of any consistent common law or statutory meaning of the term. *Molzof v. United States*, 502 U.S. 301, 307 (1992). But this also enhances the importance of the legislature's modifications to phrases arising out of common law or statutory usage. Although the concept of punitive damages has a common law meaning and has been consistently interpreted by courts when it appears alone in a statute, it was consciously modified by the statutory language of §1981a.

In *Molzof*, the Court construed the meaning of the term "punitive damages" as used without modification in the Federal Tort Claims Act, 28 U.S.C. §2674. The Court noted that the common law definition of punitive damages is based upon the nature of the defendant's conduct, and not upon the

degree of harm to the plaintiff. *Id.* at 307.[8] The Court's opinion suggests that under the common law definition of punitive damages, either intentional or egregious misconduct is sufficient for an award to be considered punitive. *Id.* at 312 ("the damages are not punitive damages because their recoverability does not depend upon any proof that the defendant has engaged in intentional or egregious misconduct and their purpose is not to punish."). Thus, where, as in §1981a, modifying terms are used, and these terms imply intent rather than egregiousness, the standard for punitive damages under the statute must be recognized as one requiring little more than intent to disregard a known right, not the stringent egregiousness standard adopted by the Circuit Court.

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[8] *See also Smith*, 461 U.S. at 54:

> The focus is on the character of the tortfeasor's conduct - whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. If it is of such a character, then it is appropriate to allow a jury to assess punitive damages; and that assessment does not become less appropriate simply because the plaintiff in the case faces a more demanding standard of actionability. To put it differently, society has an interest in deterring and punishing all intentional or reckless invasions of the rights of others, even though it sometimes chooses not to impose any liability for lesser degrees of fault.

Accord BMW v. Gore, 517 U.S. at 575 ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."); Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 387 (1994) ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.")

While the ordinary meaning of words in a statute is important, the words "malice" and "reckless indifference" are also terms of art with well-developed prior judicial constructions which must be considered as well. For example, the constitutional standards limiting common law recovery for defamation impose a malice requirement. "Actual malice" is established by proving that a publication was made knowing it to be false or with reckless disregard for whether or not it was false. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Eteenpain Co-op Soc. v. Lillback*, 18 F.2d 912, 917 (1st Cir. 1927). Far from implying personal animus against the subject of the defamation, it is sufficient to prove only an intentional publication of a knowing falsehood. Similarly, the "malice" standard employed by Congress in enacting §1981a should be construed to require only an intentional, knowing disregard of a federal right, and not actual animus against the claimant.

B. THE STANDARD OF PUNITIVE DAMAGES LIABILITY PROPOSED BY THE *EN BANC* CIRCUIT COURT DISSENT COMPORTS CLOSELY WITH THE STANDARDS AND PRACTICE OF TITLE VII EMPLOYER LIABILITY

Neither the heightened standard of egregiousness required by the Circuit Court majority nor the strictly intent-based approach proposed by the Petitioner is compatible with the language and application of Title VII. Title VII ordinarily provides liability only for the employer as an entity, and not for individual supervisors or fellow workers.[9] Employer liability

[9] "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each

in disparate treatment cases brought under Title VII is not based on the employer's intentional conduct, but is strictly applied without regard to fault where disparate treatment based on a protected status is established. Likewise, in the area of Title VII sexual harassment discrimination, strict liability is commonly imposed without regard to employer fault in the case of *quid pro quo* sexual harassment that results in tangible job detriment to the employee.[10] In hostile environment sexual harassment cases, courts have followed this

of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ." 42 U.S.C. Sec. 2000e(b)(1981). Courts generally construe this definition to impose liability only on the employer as an entity, and not on individual supervisors or other agents. *See, e.g., Tomka v. Seiler*, 66 F.3d 1295 (2d Cir. 1995); *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994). The Fifth Circuit has construed the term "agent" to include immediate supervisors when they are delegated the employer's traditional right of hiring and firing. *See Quijano v. Univ. Federal Credit Union*, 617 F.2d 129 (5th Cir. 1980); *Hamilton v. Rodgers*, 791 F.2d 439, 442-43 (5th Cir. 1986). Even in that circuit, however, there is no Title VII liability "for the actions of mere co-workers." *Harvey v. Blake*, 913 F.3d 226, 228 (5th Cir. 1990).

[10] "There is little controversy regarding the effect of *quid pro quo* harassment by supervisors; in *quid pro quo* harassment cases, courts readily impose liability on the employer without regard to the agency issues." David B. Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by their Supervisors*, 81 Cornell L. Rev. 66, 71 n. 32 (1995); *see also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 Harv. L. Rev. 445, 496 (1997). *See Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1443 (10th Cir. 1997.) ("In cases involving *quid pro quo* harassment, courts routinely hold, with little or no discussion, that the employer is 'strictly liable' for the supervisor's wrongful conduct.") This rule was substantially adopted for cases involving quid pro quo retaliation, submission and/or tangible job detriments in the Court's last term in *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998).

Court's directive in *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986) and engaged in analyses of common law agency principles of liability to determine whether liability may be exposed.

Consequently, liability based on the intent of the employer alone cannot reflect the way that Title VII is actually applied in practice. In light of the extreme degree of flexibility built into the standard for employer liability in Title VII, particularly in the area of sexual harassment discrimination, any rule for punitive damages must also incorporate a high degree of flexibility dependent on the nexus between the employer-defendant and the authority of the wrongdoer. The Circuit Court dissent's view articulates well the rationale for this approach:

> Obviously, if the person discriminating is the same as the employer - in a sole proprietorship, for example- there is no difference between the employer's awareness of its legal obligations and the employee's. But where a gap exists in the agency relationship between the agent and the entity being held liable, *i.e.*, where the employee making the hiring or firing decision does not constitute the employer's entire decision-making apparatus, the punitive damages inquiry requires the jury to examine the employer's awareness of the law.

Kolstad, 139 F.3d at 973. Under this approach, an employer would be able to demonstrate that although it had been found liable for the discriminatory acts of an employee, it should not have to pay punitive damages because it had undertaken "good-faith efforts to comply with Title VII - for example, by hiring staff and managers sensitive to Title VII responsibilities, by requiring effective EEO training, or by developing and

using objective hiring and promotion standards - thereby demonstrating that it never acted in reckless disregard of federally protected rights." *Id.* Punitive damages liability should not arise otherwise, since Title VII itself requires no more than this of its employers. *Cf.* "Guidelines on Discrimination Because of Sex," Equal Employment Opportunity Commission, C.F.R. Sec. 1604.11(f) ("An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and develcping methods to sensitize all concerned.")

The Court's *amicus* believes that such a standard is appropriately applied to the type of disparate treatment case illustrated by the case at bar. This standard would not require a measure of egregiousness of conduct, which centers on effects to the victim, but would focus on the Respondent's state of mind and whether in pursuing the offending actions Respondent acted in haste under urgent business exigencies (i.e. a business justification exists) or was carrying out a responsibility which did not clash with the requirements of Title VII. In the latter case, a showing of intentional discrimination would be enough to meet the requirements of either "malice", defined above as deliberate indifference, or "reckless indifference" to the federally protected rights of the Petitioner. If the Respondents cannot show any business requirement for the offending conduct, nor any competing interests causing the conduct, and where it has been shown to have acted intentionally and with indifference to the rights of the Petitioner, the minimum standards for a showing of deliberate or reckless indifference have been met. Under

these conditions, the Respondent's conduct ought to be punishable by the imposition of punitive damages.[11]

IV. CONCLUSION

The question raised in this case is the proper interpretation of the terms "malice or reckless indifference" in 42 U.S.C. §1981a(b)(2), as applied to the claim of a plaintiff seeking punitive damages under Title VII. The Rutherford Institute submits that in this case, the statutory language must be given its full effect and not limited by common law concepts as to the meaning of the term punitive damages. The question of punitive damages should have rightly been put to the jury for determination, subject to the standard procedure for review for error by the judge and court of appeals.

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[11] An example of this type of approach taken by this Court is found in *Wilson v. Seiter*, 501 U.S. 294 (1991), an Eighth Amendment case brought by prisoners against prison officials. The Court required a showing by the prisoners of only deliberate indifference on the part of prison officials for an Eighth Amendment violation giving rise to punitive damages. 501 U.S. at 302. In the context of Eighth Amendment challenges to prison officials' conduct, *Whitley v. Albers* had previously held that offending conduct must be "wanton." 475 U.S. 312, 319 (1986). In *Wilson*, the Court contrasted cases of prison outbreaks where officials had to balance harm to prisoners with concerns for the safety of prison staff and other inmates. 501 U.S. at 302. The issue in *Wilson* was one of attending to the medical needs of inmates. In such a situation, the Court ruled that since these responsibilities do not normally clash with other equally important government responsibilities (*e.g.* quelling a violent outbreak), deliberate indifference constituted wantonness. *Id.* In these cases, wantonness of conduct does not depend on the conduct's effects on the prisoner, only the actor's state of mind. *See Wilson*, 501 U.S. at 303.

For the reasons set forth above, *amicus curiae* The Rutherford Institute respectfully suggests that the judgment of the *en banc* Circuit Court of Appeals be reversed and the case remanded to determine punitive damages.

Respectfully submitted,

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No. 98-208

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE

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MOTION FOR LEAVE TO FILE OUT OF TIME
BRIEF *AMICUS CURIAE* OF
THE RUTHERFORD INSTITUTE

Pursuant to Rules 21 and 37.3 of the Rules of the Supreme Court of the United States, The Rutherford Institute hereby respectfully moves the Honorable Court for leave to file out of time the brief *amicus curiae* of The Rutherford Institute in the above-captioned matter, which was submitted to the Court on January 21, 1999.

1. The Rutherford Institute is an international, non-

profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in numerous cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed numerous *amicus curiae* briefs in the United States Supreme Court, including recent gender discrimination cases *Burlington Industries, Inc. v. Ellerth*, Sup.Ct. No. 97-569 (October Term 1997) and *Davis v. Monroe County*, Sup.Ct. No. 97-843 (October Term 1998), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred and ninety cases nationally in various trial and appellate courts, including numerous employment discrimination actions brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* The Institute has published educational materials and taught continuing legal education classes in this area as well.

2. On January 21, 1999, pursuant to Rule 37.3 of the Rules of the Supreme Court, counsel for The Rutherford Institute submitted to the Clerk of the Supreme Court a brief *amicus curiae* in support of neither the Petitioner nor the Respondent in this action, but suggesting reversal. Insofar as the consent of the counsel for both parties could not be secured,[1] movant filed therewith a Motion for Leave to File Brief *Amicus Curiae*. Service of the Motion for Leave to File

[1] The consent of counsel for the Respondents was obtained. The consent of counsel for the Petitioners was requested and refused.

Brief *Amicus Curiae* and the Brief *Amicus Curiae* of The Rutherford Institute was made on counsel for both parties and proof of service submitted therewith pursuant to Rules 37.5 and 29 of the Court.

3. The Motion for Leave to File Brief *Amicus Curiae* and the Brief *Amicus Curiae* of The Rutherford Institute were submitted to the Court out of time, insofar as Rule 37.3(a) clearly states that an *amicus curiae* brief in a case in which review has been accepted "shall be submitted within the time allowed for filing the brief for the party supported, *or if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief.*" (Emphasis supplied.)

4. Counsel of Record's error was completely inadvertent and unintentional, and arose from counsel's incorrect reading of Rule 37 of the Rules of the Supreme Court. In calendaring the due date, counsel improperly referred to Rule 37.2, which relates to *amicus* briefs filed for petitions for writ of *certiorari* and permits the filing of a brief on behalf of neither party "within the time allowed for filing a brief in opposition." The error was entirely Counsel of Record's, and counsel sincerely regrets the error.

5. Counsel was contacted by telephone on January 27, 1999, by a clerk in the Documents Control Division of the Court, who pointed out the error. Upon being apprised of the error, counsel acted as expeditiously as possible to ascertain how the mistake occurred and to draft and file this Motion.

6. In view of the circumstances as stated above, and in consideration of the nature of Movant's brief as an *amicus* brief of an independent officer of the Court submitted on behalf of neither party, Movant respectfully requests the Court's

forbearance in this matter and asks that an order be issued permitting Movant to file its brief out of time as of the date on which the Court may grant this Motion.

Respectfully submitted,

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